Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

MICHAEL D. LANDRY,

Petitioner,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 30, 2000

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QUESTION PRESENTED

Whether the administrative law judge in the instant case was an "Officer of the United States" whose appointment violated the Appointments Clause of the U.S. Constitution, art. II, § 2, cl. 2.

PARTIES TO THE PROCEEDING

All parties appear in the caption of this case. Petitioner, petitioner below, is Michael D. Landry. Respondent, respondent below, is the Federal Deposit Insurance Corporation, an independent agency in the Executive Branch.

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PETITION FOR A WRIT OF CERTIORARI

Michael D. Landry petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. 1a) is reported at 204 F.3d 1125. The Decision and Order of the Federal Deposit Insurance Corporation (App. 40a) is reported at 1 FDIC Enf. Dec. and Orders ¶ 5256 at A-3017. The Recommended Decision of Administrative Law Judge Walter J. Alprin (the "ALJ") (App. 109a) is reported at 1 FDIC Enf. Dec. and Orders ¶ 5256 at A-3044.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. This Petition for a Writ of Certiorari was timely filed. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Appointments Clause of the U.S. Constitution, art II, § 2, cl. 2, provides:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by

> Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Section 556(a)-(c) of Title 5, U.S.C. provides as follows:

> (a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.
>
> (b) There shall preside at the taking of evidence –
>
> (1) the agency;
>
> (2) one or more members of the body which comprises the agency; or
>
> (3) one or more administrative law judges appointed under section 3105 of this title.
>
> This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may –

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties or by the use of alternative means of dispute resolution as provided in subchapter IV of this chapter;

(7) inform the parties as to the availability of one or more alternative means of dispute resolution, and encourage use of such methods;

(8) require the attendance at any conference held pursuant to paragraph (6) of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;

(9) dispose of procedural requests or similar matters;

(10) make or recommend decisions in accordance with section 557 of this title; and

(11) take other action authorized by agency rule consistent with this subchapter.

Section 3105 of Title 5, U.S.C. provides, in part, as follows:

> Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title. Administrative law judges shall be assigned to cases in rotation so far as practicable, and may not perform duties inconsistent with their duties and responsibilities as administrative law judges.

STATEMENT OF THE CASE

On April 30, 1996, the FDIC issued a Notice of Intention to Remove and to Prohibit from Further Participation, commencing a proceeding to ban the Petitioner and four other individuals from the banking industry. Under applicable law, there were seven individuals who could have presided over the trial phase of the Petitioner's administrative case: the five members of the FDIC's Board of Directors (which includes the Comptroller of the Currency and the Director of the Office of Thrift Supervision) and two administrative law judges (including the ALJ) in the Office of Financial Institution Adjudication ("OFIA") of the Office of Thrift Supervision.[1] *See* 5 U.S.C.

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[1] The two judges are employed by the Office of Thrift Supervision under the authority of section 916 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 103 Stat. 183, 486: "Before the close of the 24-month period beginning on the date of the enactment of this Act, the appropriate Federal banking agencies (as defined in section 3(q) of the Federal Deposit Insurance Act) [*i.e.*, the Office of the Comptroller of the Currency, the Board of Governors of the

§ 556(b). The two OFIA administrative law judges assigned the case to the ALJ.

In a pretrial motion under 5 U.S.C. § 556(b), the Petitioner raised an Appointments Clause challenge to the appointment of the ALJ. The ALJ postponed consideration of the motion until the post-trial briefing. In that briefing, FDIC counsel expressly conceded that the ALJ was an inferior "Officer of the United States" within the meaning of the Appointments Clause. On August 14, 1998, the ALJ issued a Recommended Decision in favor of removal. App. 109a. Addressing the Petitioner's Appointments Clause challenge, the ALJ held that administrative law judges are "Officers of the United States":

> . . . Congress may vest the authority to appoint *inferior officers, including Administrative Law Judges,* in either the President, the courts of law, or the heads of Departments. The motion's position is that Congress has no constitutional

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Federal Reserve System, the FDIC, and the Office of Thrift Supervision] and the National Credit Union Administration Board shall jointly – (1) establish their own pool of administrative law judges. . . . " For Appointments Clause purposes, the OTS is a bureau of the Department of the Treasury. *Doolin Security Savings Bank, F.S.B. v. Office of Thrift Supervision,* 139 F.3d 203, 207 (D.C. Cir. 1998), citing *Freytag v. Comm'r of Internal Revenue,* 501 U.S. 868 (1991).

A collateral challenge to the constitutionality of the OFIA was rejected for lack of jurisdiction in *Leuthe v. Office of Financial Institution Adjudication,* 977 F. Supp. 357 (E.D. Pa. 1997), *aff'd,* 162 F.3d 1151 (3rd Cir. 1998), an unrelated case. As *Leuthe* demonstrates, the only way in which a challenge to an OFIA administrative law judge can be made is under 5 U.S.C. § 556(b).

> authority to assign the power elsewhere, but the case citations . . . show otherwise.

App. 214a-215a (emphasis added).

On May 25, 1999, a removal order was adopted by the FDIC's Board of Directors. App. 40a. The five members of the FDIC's Board of Directors, including both the Comptroller of the Currency and the Director of the Office of Thrift Supervision, unanimously agreed that the ALJ was an "Officer of the United States." App. 95a-97a. But the Board nevertheless rejected the Petitioner's Appointments Clause challenge: "Congress has, in many instances and for many years, vested in non-Cabinet agencies the authority to appoint *inferior officers*." App. 96a (emphasis added; footnote omitted).

The Petitioner sought review in the United States Court of Appeals for the District of Columbia Circuit, which had jurisdiction of the case under 12 U.S.C. § 1818(h)(2). The court of appeals, *sua sponte*, expedited the briefing of the case and ordered that oral argument be scheduled for the first available date following the briefing. In the court of appeals, the FDIC finally conceded that the ALJ had not been appointed in the manner prescribed by the Appointments Clause, but argued, *for the first time*, that the ALJ was not an "Officer of the United States."

A sharply divided court of appeals denied the petition for review. The majority recognized that a violation of the Appointments Clause would be "structural" and thereby require relief. App. 8a-12a. However, the majority held that the ALJ was not an "Officer of the United

States," distinguishing *Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868 (1991), on the basis that the ALJ could recommend a decision, but could not finally decide the case. App. 14a-16a. Judge Randolph vigorously disagreed:

> In my view, *Freytag v. Commissioner*, 501 U.S. 868 (1991), cannot be distinguished. The Administrative Law Judge who presided over Landry's case was as much an "inferior Officer" under Article II, § 2, cl. 2 of the Constitution as the special trial judge in *Freytag*.
>
> . . .
>
> There are no relevant differences between the ALJ in this case and the special trial judge in *Freytag*. Both held offices "established by Law," Art. II, § 2, cl. 2; 501 U.S. at 881. In both instances, "the duties, salary, and means of appointment for that office are specified by statute." *Id.*; *see* maj. op. at 12. Both "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." 501 U.S. at 881-82; *Samuels* [*Kramer & Co. v. Comm'r*], 930 F.2d [975] at 986; *see* 12 C.F.R. § 308.5 (defining the ALJ's duties). "In the course of carrying out these important functions," both the special trial judge in Freytag and the ALJ in this case "exercise significant discretion." 501 U.S. at 882.
>
> . . . The fact that an ALJ cannot render a final decision and is subject to the ultimate supervision of the FDIC shows only that the ALJ shares the common characteristic of an "inferior Officer." "[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were

appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 663 (1997).

According to the majority opinion, the second difference between this case and *Freytag* is that here the ALJ can never render final decisions of the FDIC, whereas special trial judges could, in cases other than the sort involved in *Freytag*, render a final decision of the Tax Court. See maj. op. at 11, 12-13. It is true that the Supreme Court relied on this consideration. . . . What the majority neglects to mention is that the Court clearly designated this as an alternative holding. The Court introduced its alternative holding thus: "Even if the duties of special trial judges . . . were not as significant as we and the two courts have found them to be, our *conclusion* would be unchanged." 501 U.S. at 882 (italics added). What "conclusion" did the Court have in mind? The conclusion it had reached in the preceding paragraphs – namely, that although special trial judges may not render final decisions, they are nevertheless inferior officers of the United States within the meaning of Article II, § 2, cl. 2. The same conclusion, the same holding, had also been rendered in *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 986 (2d Cir. 1991), a decision the Supreme Court cited and expressly approved. *See* 501 U.S. at 881. There the Second Circuit held that a special trial judge performing the same advisory function as the judge in *Freytag* was an inferior officer; the court of appeals did not mention the fact that in other types of cases, the judge could issue final judgments.

> That the ALJ in this case is an inferior officer thus follows from *Freytag*. It follows also from the Supreme Court's recognition that the role of the modern administrative law judge "is 'functionally comparable' to that of a judge. . . . He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make *or* recommend decisions. See [5 U.S.C.] § 556(c)." *Butz v. Economou*, 438 U.S. 478, 513 (1978) (emphasis added). Furthermore, the ALJ, in proposing findings of fact and a recommended decision, which the FDIC reviewed *de novo*, performed functions essentially like those of a federal magistrate assigned to conduct a hearing and to submit proposed findings and recommendations to a district judge. *See* 28 U.S.C. § 636(b)(1)(B). When there is an objection to a magistrate's findings and recommendations, the district judge – like the FDIC – must conduct *de novo* review. *See* 28 U.S.C. § 636(b)(1)(C). Nonetheless, it has long been settled that federal magistrates are "inferior Officers" under Article II, which is why they are appointed by "Courts of Law" under 28 U.S.C. § 631. *See Rice v. Ames*, 180 U.S. 371, 378 (1901); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-54 (1931); *Pacemaker Diagnostic Clinic v. Instromedix*, 725 F.2d 537, 545 (9th Cir. 1984) (en banc).

App. 31a-37a [footnotes omitted].

REASONS FOR GRANTING THE WRIT

This case involves a class of judges numbering more than 1,000, who are statutorily authorized to perform

some of the adjudicatory functions of the heads of administrative agencies but, unlike the heads of agencies, are not statutorily required to be appointed in the manner prescribed by the Appointments Clause. Four times in the last decade, this Court has granted certiorari in cases involving Appointments Clause challenges to other classes of judges. In some of these cases, the Appointments Clause challenge was made late in the case. In one case, guilt had been conceded. Yet in each of these cases this Court not only granted certiorari, but ultimately recognized that the judges in each of these other classes were "Officers of the United States" who must be appointed in the manner prescribed by the Appointments Clause.

An "Officer of the United States" is "any appointee exercising significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam). The adjudicatory functions of administrative law judges are functionally comparable to those performed by Article III judges, who are principal "Officers of the United States." *See Butz v. Economou*, 438 U.S. 478, 513-14 (1978).[2] They are also similar to those of United

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[2] *Butz* discussed the powers exercised by an administrative law judge in terms that leave no doubt as to their significance:

> His powers are often, if not generally, comparable to those of a trial judge: He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make or recommend decisions. *See* [5 U.S.C. §] 556(c). More importantly, the process of agency adjudication is currently structured so as to assure that the hearing examiner exercises his independent judgment on the evidence before him,

States Magistrates, who are "inferior Officers of the United States." *See Pacemaker Diagnostic Clinic v. Instromedix*, 725 F.2d 537, 545 (9th Cir. 1984) (en banc), citing *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-54 (1931), and *Rice v. Ames*, 180 U.S. 371, 378 (1901).

It is tautological that the heads of federal agencies exercise significant authority pursuant to the laws of the United States and are thereby "Officers of the United States" who must be appointed in the manner prescribed by the Appointments Clause. *Buckley*, 424 U.S. at 137 (assumption that all powers granted in agency statute may be exercised by agency whose members have been appointed in accordance with the Appointments Clause). Administrative law judges perform adjudicatory functions otherwise those of agency heads, but are prohibited from performing any duties inconsistent with those adjudicatory functions. 5 U.S.C. §§ 556(b) and 3105. Thus, the only distinction between administrative law judges and the heads of the agencies for Appointments Clause purposes is that the former are supervised by the latter. Such supervision does not make administrative law judges "employees," but rather "inferior Officers." *See Edmond v. United States*, 520 U.S. 651, 662-63 (1997). The fact that Congress provided for disqualification of administrative law judges in 5 U.S.C. § 556(b) is a further recognition that the authority provided elsewhere in section 556 is significant. Thus, it would seem to follow inescapably that an administrative law judge exercises significant

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free from pressures by the parties or other officials within the agency.

438 U.S. at 513-14.

authority – and only significant authority – and therefore is an "Officer of the United States" who must be appointed in the manner prescribed by the Appointments Clause. *See Freytag*, 501 U.S. at 881-82 (Tax Court special trial judges exercise "significant" authority and discretion and are thereby "inferior Officers"). Yet until now the question whether administrative law judges are "Officers of the United States" has not been before this Court. The question having been raised at each stage in the instant case, it is appropriate for this Court to grant certiorari and resolve this structural constitutional issue.

Four of this Court's Appointments Clause cases decided in the last decade compel the conclusion that an administrative law judge is an "Officer of the United States." The first of theses cases, *Freytag*, dealt with the validity of the appointment of "[a] special trial judge [who could not] render the final decision of the Tax Court in a case assigned under [26 U.S.C. § 7443A(b)(4)]." 501 U.S. at 876-77. *Freytag* rejected the argument that such a special trial judge was "only an employee" rather than an "Officer of the United States." *Id.* at 880-82. As Judge Randolph observed in the instant case, this Court could have chosen to rest its holding in *Freytag* solely upon the fact that a special trial judge was conceded to be an "Officer of the United States" when exercising authority under 26 U.S.C. § 7443A(b)(1)-(3), but instead based its holding on the significant nature of the functions of the special trial judge, *i.e.*, that holding a trial and rendering a recommended decision, were functions of an "Officer of the United States."

In *Freytag*, 501 U.S. at 881, this Court expressly approved *Samuels, Kramer & Co. v. Comm'r of Internal*

Revenue, 930 F.2d 975 (2d Cir. 1991). *Samuels* had described the role of special trial judges of the Tax Court in words strikingly similar to this Court's language in *Butz*:[3]

> The special trial judges are more than mere aids to the judges of the Tax Court. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. Contrary to the contentions of the Commissioner, the degree of authority exercised by special trial judges is "significant." *See Buckley*, 424 U.S. at 126, 96 S. Ct. at 685. They exercise a great deal of discretion and perform important functions, characteristics that we find to be inconsistent with the classifications of "lesser functionary" or mere employee. *Cf. Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352, 51 S. Ct. 153, 156, 75 L.Ed. 374 (1931) (United States commissioners are inferior officers).

930 F.2d at 986. These powers are essentially identical to those of the heads of agencies or administrative law judges under 5 U.S.C. § 556(c).

This Court was well aware of the prospective effects of its decision in *Freytag*, for the Solicitor General's brief in *Freytag* predicted that the effect of the ultimate ruling in that case would be to render invalid the appointments of some administrative law judges:

> But petitioners' conclusion – based on their examination of *administrative law judges* and staff

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[3] Quoted at 10-11 n.2, *supra*.

> attorneys of the Securities and Exchange Commission – depends on the remarkable assertion that all individuals in agencies (except their heads) are "employees." Pet. Br. 39. Without painting a bulls-eye on inferior Officers whose appointments would be rendered invalid under petitioners' theory, we think it obvious that between the "employees" and "heads" of agencies are a significant number of inferior Officers. Cf. 3 J. Story, Commentaries on the Constitution of the United States Section 1538 (1833) (" 'inferior officers,' * * * probably includes ninety-nine out of a hundred of the lucrative offices in the government"). Here petitioners meet themselves coming and going. For if inferior Officers include legal assistants who hear and report on tax cases – as petitioners argue in asserting that special trial judges are not mere employees, Pet. Br. 27-28 – they surely account for a large number of positions in agencies as well. And their appointments, if made by the heads of those allegedly non-"departmental" components of the Executive Branch, would all be invalid under petitioners' iconoclastic submission.

Brief for Respondent at 46-47, *Freytag* (footnote omitted; emphasis added). The majority opinion in *Freytag* specifically adverted to the "inexorable presence of the administrative state," 501 U.S. at 885, and Justice Scalia's concurrence, joined by three others, mentioned administrative law judges three times in agreeing that special trial judges were "Officers of the United States." 501 U.S. at 910, 920 (Scalia, J., concurring).[4]

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[4] The meaning of *Freytag* was also recognized by a leading scholar in the field of administrative law. *See* Peter L. Strauss,

The majority below discussed *Freytag* briefly, but failed to give adequate consideration to three more of this Court's recent Appointments Clause cases involving judges. Each of these three cases is consistent with *Freytag* and inconsistent with opinion of the court below. In *Weiss v. United States*, 510 U.S. 163 (1994), after entering guilty pleas, two United States Marines appealed their convictions, arguing that the military judges who convicted them were appointed in violation of the Appointments Clause. Like the special trial judges in *Freytag* and the ALJ in the instant case, the military judge's determination as to the facts and the sanction was not final. No sentence imposed by the military judge could become final until it was approved by the officer who convened the court-martial. *Weiss*, 501 U.S. at 167. The fact-finding of the military judges in *Weiss*, like that of the ALJ in the instant case, was subject to *de novo* review. *Id.* at 193 (Souter, J., concurring). *Weiss* held that military judges are "Officers of the United States" and must be appointed pursuant to the Appointments Clause. 510 U.S. at 170.

In *Ryder v. United States*, 515 U.S. 177 (1995), the Government conceded that the civilian judges of the Court of Military Review had not been appointed pursuant to the Appointments Clause, but argued that Ryder's conviction should be affirmed notwithstanding this defect. *Ryder* held that review of the decisions made

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Administrative Law: The Hidden Comparative Law Course, 46 J. LEGAL EDUC. 478, 483 (1996), "If a special judge of the Tax Court is an officer of the United States for Appointments Clause purposes because of the authority she wields, so certainly is an administrative law judge in the Department of the Interior. . . ."

by the military judges of the Court of Military Review by a higher, properly constituted tribunal (the Court of Military Appeals) was insufficient to deny relief in situations where the defendant raised the issue on direct appeal. *Id.* at 182-83. The convictions were reversed. Thus, under *Ryder* the FDIC Board's *de novo* review does not cure the constitutional violation in the instant case.

Finally, in *Edmond v. United States*, 520 U.S. 651 (1997), this Court held that judges of the Coast Guard Court of Criminal Appeals were "inferior Officers of the United States" within the meaning of the Appointments Clause. This Court recognized in *Edmond* that the Coast Guard judges who, like the ALJ in the case at bar, had no power to render a final decision, 520 U.S. at 665, were " 'exercising significant authority on behalf of the United States.' " 520 U.S. at 662. Accordingly, those judges were "Officers of the United States." *Id.*, citing *Buckley*, 424 U.S. at 126. So, too, was the ALJ in the instant case.

Like the Government in *Freytag*, the FDIC has taken inconsistent positions with respect to the Appointments Clause. *Compare* 501 U.S. at 889 n.5 *with* App. 96a. In *Freytag*, the initial position of the Government ultimately carried the day. The Petitioner submits that the FDIC's initial position on the constitutional status of the ALJ – the position adopted by the Board of Directors, not FDIC appellate counsel – should prevail here. The question of the ALJ's constitutional status has been passed upon by nine individuals, including the ALJ himself, the five members of the FDIC's Board of Directors, and the members of the panel below. Seven of those nine individuals agree with the Petitioner that the ALJ is an "Officer of the United States." Thus, even assuming, *arguendo*, that they

are wrong and that the opinion of the court below was correct, the structural constitutional principles involved in this case are nevertheless in urgent need of definitive resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 30, 2000

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S. App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 19, 1999

Decided March 3, 2000

No. 99-1230.

MICHAEL D. LANDRY,
PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
RESPONDENT

On Petition for Review of an Order of the
Federal Deposit Insurance Corporation

John C. Deal argued the cause and filed the briefs for petitioner.

Kathryn R. Norcross, Counsel, Federal Deposit Insurance Corporation, argued the cause for respondent. With

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

her on the brief were *Ann S. DuRoss*, Assistant General Counsel, and *Colleen J. Boles*, Senior Counsel. *Thomas A. Schulz*, Assistant General Counsel, and *Ashley Doherty* and *Thomas L. Holzman*, Counsel, entered appearances.

Before: EDWARDS, *Chief Judge*, WILLIAMS and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Separate opinion concurring in part and concurring in the judgment filed by *Circuit Judge* RANDOLPH.

WILLIAMS, *Circuit Judge*: Congress has given the Federal Deposit Insurance Corporation ("FDIC") a variety of weapons to use against individuals whose actions threaten the integrity of federally insured banks or savings associations. Among these is the power to remove a bank officer from his position and to bar him from further participation in the operations of a federally insured depository institution. *See* 12 U.S.C. § 1818(e)(1). On April 30, 1996 the FDIC notified Michael D. Landry that it intended to seek such an order against him because of his conduct as Senior Vice President, Chief Financial Officer, and Cashier of First Guaranty Bank, Hammond, Louisiana.

As required by statute, the FDIC assigned the matter to an administrative law judge for a formal, on-the-record, administrative hearing. *See* 12 U.S.C. § 1818(e)(4); 5 U.S.C. §§ 554, 556. The ALJ held a two-week hearing and then issued a decision recommending that the FDIC

issue the proposed prohibition order.[1] Landry filed exceptions to the ALJ's recommendation, and the case was forwarded to the FDIC's Board of Directors for a final decision. The Board agreed with the recommendation and issued an order of removal and prohibition. *See In re Michael D. Landry*, FDIC 95-65e, May 25, 1999 ("Order"), Joint Appendix ("J.A.") 218, 264-66. Landry filed a timely petition for review. The principal issue for review is Landry's argument that the FDIC's method of appointing ALJs violates the Appointments Clause of the Constitution, Art. II, § 2, cl. 2. Landry also argues that the evidence against him did not meet the statutory minimum for the remedies against him and that the FDIC violated various procedural requirements. We affirm.

* * *

From the late 1980s to early 1993, First Guaranty was in serious financial trouble. In 1990, the FDIC issued a capital directive requiring it to obtain a $4.7 million infusion of capital by January 1, 1991. The Bank tried unsuccessfully to raise capital through a stock solicitation, and when the FDIC completed its 1991 examination the Bank's position looked bleaker than ever. Soon afterward, the FDIC told the Bank's board of directors that it would seek to terminate the Bank's deposit insurance. It agreed,

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[1] In the same proceedings, FDIC enforcement counsel also sought, and ultimately received, a prohibition order against Alton B. Lewis, a member of the Bank's Board of Directors who also did some legal work for the bank. Lewis's petition for review is pending before the United States Court of Appeals for the Fifth Circuit. *See Lewis v. FDIC*, No. 99-60412 (5th Cir. filed June 18, 1999).

however, to delay termination proceedings while further recapitalization plans proceeded. In early 1992 the FDIC conducted another examination and found that the Bank's financial position had improved slightly, but that it was still a candidate for near term failure. After Landry and others pursued a series of attempts to add capital to the Bank – some of which can only be described as bizarre and desperate – the Bank's board on September 17, 1992 accepted an offer of purchase, and in December 1992 the Bank received the necessary capital infusion.

Landry's alleged malfeasance occurred in connection with a capital enhancement plan initially proposed by Rick A. Jenson, the Bank's former president, and Scott Crabtree, a consultant, involving a corporation called Pangaea. The FDIC and Landry agree that he had a role in this plan but disagree as to the scope of his role, his motivation, and the significance of his conduct. The FDIC Board, adopting the ALJ's factual findings, found that Landry and his two associates were the incorporators of Pangaea Corporation, and that they planned to use Pangaea to acquire an 80% interest in the Bank. They hoped to raise $16 million by selling 30% of Pangaea's stock, retaining 70% for themselves. Of the $16 million Pangaea would use $7.5 million to beef up the Bank's capital through purchases of its stock, $6.5 million to form a limited partnership to buy real estate from the Bank's portfolio, and $2 million to pay Pangaea expenses and to finance other ventures. They presented this plan as a means of finding capital for the Bank, and obtained approval at an executive meeting of the Bank's board of directors on August 8, 1991, but as Landry would later admit, the board was misled because the plan was "not

presented as a management takeover/buyout of the Bank." Instead, the Bank's board was led to believe that Pangaea was an arm of the Bank so that a capital infusion would entail no genuine change in control of the Bank. After board approval, the Bank forwarded a draft copy of a descriptive booklet to the FDIC examiners. They rejected the plan because they believed it offered no short term capital infusion and Pangaea had no serious prospect of actually raising the $16 million. (The FDIC had determined that investors could have acquired complete ownership of the entire bank for $5 million, so that investors would not be willing to pay $16 million for a 30% interest in an entity (Pangaea) that would own only 80% of the Bank.)

Undeterred, Jenson, Crabtree and Landry pursued a variety of imaginative sources of capital, many of which involved Pangaea. These sources included: individuals seeking United States citizenship under a provision of the immigration laws admitting individuals who invest $1 million in a new business venture that creates ten or more new jobs; pension funds solicited for the immigration scheme with the help of an image-enhancement firm with pension fund contacts; a preferred stock offering for Pangaea prepared by Funding Placement Services; and an Ecuadorian currency scheme through which one could purportedly obtain a 500% return in six weeks.

Although this "Pangaea plan" never much developed, and although Pangaea was unlikely ever to have received approval to acquire the Bank from its board of directors or federal regulators, the FDIC Board found that Landry's fellow Pangaea incorporators – with Landry's full knowledge and cooperation – executed enough of the

plan to cause the Bank to lose substantial sums of money in the form of promotional expenses, *see* Order at 14, 17-18, 29-30, J.A. at 231, 234-35, 246-47, questionable loans, *see id.* at 14-15, 17, J.A. 231-32, 234, and other unwise or illegal banking activities, *see id.* at 13, 16, 20, J.A. at 230, 233, 237, without informing the directors that their plan was designed to enrich the incorporators while providing little or no benefit to the Bank itself. The Board also found Landry had failed to satisfy FDIC rules requiring disclosure of material changes in the Bank's operations. *See* Order at 20, J.A. at 237.

The Board's most compelling evidence came in the form of a 16-page letter dated June 3, 1993 that Landry himself wrote to bank examiner G. Martin Cooper ("Landry letter"), and to which he attached more than 500 pages of supporting material. The Landry letter described the activities at issue here and linked them to Pangaea. Landry's personal culpability, laid bare in this letter, was reinforced by Landry's resignation letter (not accepted by the Bank's board of directors), in which he described his conduct as "self dealing" and "for the good of Pangaea Corporation at the expense of First Guaranty Bank," as well as his May 12, 1995 deposition, in which he admitted that Pangaea had become a vehicle to "make money off the bank." After examining all of the evidence, the FDIC Board concluded that although other wrongdoers may have been more culpable, Landry's conduct met the statutory criteria and thus warranted a removal and prohibition order. *See* Order at 21-22, J.A. at 238-39.

Appointments Clause

Landry argues that the FDIC's method for appointing ALJs violates the Appointments Clause of the Constitution:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., Art. II, § 2, cl. 2.

Landry would classify ALJs who conduct administrative proceedings for the various federal banking agencies as "inferior officers" of the United States. If so, Congress's instruction to the banking agencies to "establish their own pool of administrative law judges" to conduct such hearings, *see* Federal Institutions Reform, Recovery, and Enforcement Act ("FIRREA"), § 916, 103 Stat. at 486, codified at 12 U.S.C. § 1818 note, would be unconstitutional because it vests appointment authority in a set of agencies that are not (according to Landry) "departments" under the Appointments Clause. The FDIC counters that the ALJs in question need not be appointed by heads of departments because they are employees rather than inferior officers.

The FDIC also makes a preliminary objection – that Landry has shown no prejudice from any Appointments Clause violation that may have occurred. The FDIC itself determined Landry's responsibility after reviewing the

ALJ's recommended decision de novo. *See* 12 U.S.C. § 1818(h)(1) (requiring the FDIC to make its own findings of fact when issuing its final decision); 12 CFR §§ 308.38, 308.40 (requiring the FDIC Board to issue the agency's final decision). The Supreme Court has not decided whether an Appointments Clause violation requires reversal where it appears to have done a party no direct harm. *Ryder v. United States,* 515 U.S. 177, 182-83, 186 (1995). But in *Freytag v. Commissioner,* 501 U.S. 868 (1991), in reaching the Appointments Clause issue despite its not having been raised below, the Court classified the clause as "structural," because of its purpose to prevent encroachment of one branch on another and to preserve the Constitution's structural integrity. *Id.* at 878-79. Here, of course, the issue was raised all right; the problem is that Landry's injury may be questionable. But the Court uses the term "structural" for a set of errors for which no direct injury is necessary – such as a criminal defendant's indictment by a grand jury chosen in a racially or sexually discriminatory manner. *See Vasquez v. Hillery,* 474 U.S. 254, 261 & n.4, 263 (1986) (race); *Ballard v. United States,* 329 U.S. 187, 195 (1946) (sex). In such cases, of course, the later conviction by a petit jury supplies virtual certainty that a properly constituted grand jury would have indicted, as the Court has observed in regard to lesser ranking grand jury errors. *See United States v. Mechanik,* 475 U.S. 66, 70-71 & n.1 (1986). As grand juries do not draft opinions for the petit jury, the latter's insulating effect is positively surgical compared to the FDIC's action here, however independent its review of the ALJ's decision.

The Court recently noted its use of the label "structural," observing that only in a limited class of cases has it "found an error to be 'structural,' and thus subject to automatic reversal." *Neder v. United States*, 119 S. Ct. 1827, 1833 (1999). Issues of separation of powers (including Appointments Clause matters, *Freytag*, 501 U.S. at 878), seem most fit to the doctrine; it will often be difficult or impossible for someone subject to a wrongly designed scheme to show that the design – the structure – played a causal role in his loss. And in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), the Court gave a further explanation: "[S]eparation of powers is a *structural safeguard* rather than a remedy to be applied only when specific harm, or risk of specific harm, can be identified. . . . [I]t is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict." *Id.* at 239. For Appointments Clause violations, demand for a clear causal link to a party's harm will likely make the Clause no wall at all.

There is certainly no rule that a party claiming constitutional error in the vesting of authority must show a direct causal link between the error and the authority's adverse decision. In fact, the opposite is often true. For example, in a challenge to the authority of a non-Article III court on the grounds that the challenger is entitled to a court enjoying Article III's exceptional tenure provisions, the assumption that inadequate tenure may prejudice the challenger is so automatic that it usually goes unmentioned. *See Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Palmore v. United States*, 411 U.S. 389 (1973); *Crowell v. Benson*, 285 U.S. 22 (1932).

Bowsher v. Synar, 478 U.S. 714 (1986), extended this principle to general separation-of-powers claims. Although the union plaintiffs there had clearly been injured by a suspension and proposed cancellation of their cost-of-living adjustments, *see id.* at 721, there was no showing that the Comptroller General's exposure to removal by Congress in any way increased the probability of the cuts. Instead, the Court seemed to presume that subtle variations in the quality of tenure would affect conduct. *See also Ryder*, 515 U.S. at 182-83, 186-88.

Of course in the above cases there was no de novo review following the decision of the (arguably) unlawfully designated official. (But *see Vasquez v. Hillery*, 474 U.S. at 261 & n.4, 263, and *Ballard v. United States*, 329 U.S. at 195, reversing convictions based on indictment by discriminatorily selected grand jury, despite later petit jury verdict, discussed above at 6-7.) Here there is. But *Freytag* itself indicates that judicial review of an Appointments Clause claim will proceed even where any possible injury is radically attenuated. There, the Court made plain that, had it not found the "inferior officer" appointed in a constitutional way, it was ready to throw out the Tax Court's decision simply on the ground that special trial judges ("STJs") held what it viewed as clearly the powers of an "inferior officer" (to make final decisions), even though the STJ had not exercised any power to make final decisions in Freytag's case. *See* 501 U.S. at 871-72 & n.2, 882. Indeed, the Court made no attempt to explain how the STJ's possession of powers *not used* in Freytag's case could possibly have prejudiced him. *Id.*

Moreover, Appointments Clause analysis of purely decision-recommending employees presents a special

problem. Suppose that a purely recommendatory power, i.e., one followed as here by de novo review, *can* make an employee an "inferior officer" within the meaning of the Appointments Clause – a hypothesis we must assume at this stage. If the process of final de novo review could cleanse the violation of its harmful impact, then all such arrangements would escape judicial review, unless the officer's powers happened fortuitously, as in *Freytag*, to be combined with still greater powers. Recognition of this problem may well explain the Court's statement in *United States v. L.A. Tucker Truck Lines*, 344 U.S. 33 (1952), that a defect in the appointment of an "examiner" (precursor of today's ALJ) was, if properly raised, "an irregularity which would invalidate a resulting order." *Id.* at 38. Thus, to refuse to entertain Landry's claim is to rule, in effect, that officers holding purely recommendatory powers subject to de novo review are not "inferior officers," i.e., it is to resolve the merits without purporting to do so.

For this reason our decision here is not inconsistent with *Doolin v. OTS*, 139 F.3d 203 (D.C.Cir. 1998). There we relied on *Mechanik*, 475 U.S. at 70-71, to conclude that although enforcement proceedings culminating in a "cease and desist order" were initiated by an improperly appointed Director of the OTS and therefore defective, the ultimate issuance of the final merits order by a properly appointed Director ratified the initiation and cured the error. *Doolin*, 139 F.3d at 212-14. But *Doolin* did not present the catch-22 of the present case, where the government's argument requires one to believe that, even if we assume that a pure power to recommend is enough to lift an employee into the august "inferior officer" realm,

it is not enough to taint the ultimate judgment and thus give the loser a chance to raise the issue.

Finally, we note that in *United States v. Colon-Munoz*, 192 F.3d 210 (1st Cir. 1999), the First Circuit said that "structural" has two meanings, referring not only to errors related to the constitutional structure but also to ones simply deemed so "fundamental" as to deprive a criminal trial of basic fairness. *Id.* at 217-18 n.9. The court used the distinction to justify not applying *Freytag's* rejection of the waiver argument, a problem not before us. But *Colon-Munoz* never passed on the issue that is before us – whether an issue that is structural in the sense that it derives from the constitutional structure can be reviewed even where the link between the error and the party's harm is conjectural.

We now turn to whether a violation of the Appointments Clause occurred. The line between "mere" employees and inferior officers is anything but bright. *See* Nick Bravin, Note, Is *Morrison v. Olson* Still Good Law? The Court's New Appointments Clause Jurisprudence, 98 Colum. L.Rev. 1103, 1114-15 (1998) ("Early Supreme Court attempts to define the term 'officer' provide inexact, if any, judicially manageable standards"); Edward Susolik, Note, Separation of Powers and Liberty: The Appointments Clause, *Morrison v. Olson*, and Rule of Law, 63 S. Cal. L. Rev. 1515, 1545 (1990) ("[A] definitive understanding of the term 'officer' is not forthcoming for two simple reasons: (1) there are too few cases for any consistent precedential principle to be articulated, and (2) the few cases that do exist posit conclusions rather than arguments and provide little insight to justify their results."). In fact, the earliest Appointments Clause cases

often employed circular logic, granting officer status to an official based in part upon his appointment by the head of a department. *See, e.g., United States v. Mouat*, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the Government . . . holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States"); *United States v. Germaine*, 99 U.S. 508, 510 (1878); *United States v. Hartwell*, 73 U.S. (6 Wall) 385, 393 (1867). In an attempt to clarify the inquiry, the Court has often said that "any appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' " *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976); *see also Edmond v. United States*, 520 U.S. 651, 662 (1997); *Ryder v. United States*, 515 U.S. 177 (1995); *Freytag*, 501 U.S. at 881-82,[2] but ascertaining the test's real meaning requires a look at the roles of the employees whose status was at issue in other cases.

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[2] In its Order, the Board seemed to agree with Landry that the ALJs were inferior officers but found this status irrelevant because the federal banking agencies are "departments" capable of accepting Congress's delegation of appointment power. The FDIC has abandoned its apparent concession and now argues that the ALJs are not inferior officers. Because we agree that the ALJs in question are not inferior officers we need not decide whether any of the federal banking agencies are in fact "departments" for purposes of the Appointments Clause. Moreover, because the issue before us does not depend on the FDIC's interpretation of the statute or exercise of its discretion, there is no problem under *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

In the most analogous case, *Freytag*, the Court decided that STJs were inferior officers. 501 U.S. at 881-82. In so finding, the Court relied on authority of the STJs not matched by the ALJs here. In particular, the Court noted that STJs have the authority to render the *final* decision of the Tax Court in declaratory judgment proceedings and in certain small-amount tax cases. *See id.* at 882. But the ALJs here can never render the decision of the FDIC. *See* 12 CFR § 308.38 (noting that ALJs must file a "*recommended* decision, *recommended* findings of fact, *recommended* conclusions of law, and [a] *proposed* order" (emphasis added)). Final decisions are issued only by the FDIC Board of Directors. *See* 12 CFR § 308.40(a), (c). Moreover, even for the non-final decisions of the type made by the STJ in *Freytag*, the Tax Court was required to defer to the STJ's factual and credibility findings unless they were clearly erroneous, *see* Tax Court Rule 183(c), 26 U.S.C.App. (1994); *Stone v. Commissioner*, 865 F.2d 342, 344-47 (D.C. Cir. 1989), whereas here the FDIC Board makes its own factual findings, *see* 12 U.S.C. § 1818(h)(1); 12 CFR § 308.40(c); *see also In re Landry*, FDIC-95-65e, 1999 WL 639568, at *1 (FDIC July 8, 1999) (noting that the FDIC had given Landry's case "an exhaustive de novo review"). Landry argues that the FDIC Board did not undertake a de novo review of his case, but his characterization of the FDIC's work goes only to its carefulness, not its authority.

It is, to be sure, uncertain just what role the STJs' power to make final decisions played in *Freytag*. Many of the features of the STJ job that the Court found to contribute to its being covered by the Appointments Clause have analogues here. The office of STJ was "established by

Law" (the threshold trigger for the Appointments Clause) and the "duties, salary, and means of appointment" for the office were specified by statute, a factor that has proved relevant in the Court's Appointments Clause jurisprudence. *Freytag*, 501 U.S. at 881. The ALJ position here is also "established by Law," as are its specific duties, salary, and means of appointment. *See* 5 U.S.C. § 5372 (pay scales for ALJs); 5 U.S.C. § 3105 (hiring practices); 5 U.S.C. §§ 556-557 (functions); 12 CFR pt. 308 (same). Similarly, both the ALJs here and the STJs in *Freytag* "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." *Freytag*, 501 U.S. at 881-82. And, the Court observed, "In the course of carrying out these important functions, the special trial judges exercise significant discretion," *id.* at 882, rather a magic phrase under the *Buckley* test. Further, the Court introduced mention of the STJs' power to render final decisions with something of a shrug: "Even if the duties" of STJs involving conduct of nonfinal proceedings "were not as significant as we and the two courts [Tax Court and Fifth Circuit] have found them to be, our conclusion would be unchanged." *Id.* Only then did it go on to discuss the STJs' power to make final decisions.

Nonetheless, in another way the Court laid exceptional stress on the STJs' final decisionmaking power. After noting those powers, the Court went on to explain why Freytag could raise the claim even though in his case the STJ had *not* been exercising them:

> Special trial judges are not inferior officers for purposes of some of their duties under [the enabling statute], but mere employees with

> respect to other responsibilities. The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution.

Id. All this explanation would have been quite unnecessary if the purely recommendatory powers were fatal in themselves. Accordingly, we believe that the STJs' power of final decision in certain classes of cases was critical to the Court's decision. As the ALJs hired pursuant to § 916 of FIRREA have no such powers, we conclude that they are not inferior officers.

Privilege and Brady/Jencks *claims*

During pre-trial discovery the FDIC asserted claims of deliberative process, law enforcement, and attorney-client privilege in various permutations to justify withholding 97 documents. As required by the FDIC's rules, *see* 12 CFR § 308.25(e), FDIC enforcement counsel produced a privilege log which briefly described each document and indicated its date, author, and recipient and the privileges claimed. In addition, enforcement counsel produced the affidavit of Cottrell L. Webster, the Memphis regional director of the FDIC's division of supervision, claiming to have personally reviewed each of the withheld documents, formally invoking the law enforcement and deliberative process privileges, and explaining how each privilege applied.

The ALJ rejected an initial effort to compel production of the documents, and the FDIC denied interlocutory review. It specifically rejected Landry's claim that there

were documents that *Brady v. Maryland*, 373 U.S. 83 (1963), required the FDIC to disclose. In doing so it observed that enforcement counsel's assurance that no such withheld documents existed was enough to defeat Landry's claims in the absence of some source of doubt rising above Landry's unadorned "suspicions." The ALJ also denied several requests to compel production made during the hearing itself. But when the hearing was over, the FDIC Executive Secretary ordered that the record be reopened and that FDIC enforcement counsel submit a more detailed privilege log. After reviewing the revised privilege log, the Board upheld the assertion of privilege for 44 of the documents but reopened the record a second time and ordered enforcement counsel to produce the remaining 46 documents (seven had been produced to Landry for other reasons) for in camera inspection.

After reviewing the newly submitted documents, the Board found most of them not to be privileged but did not order disclosure because it found the error harmless in light of the cumulative nature of the information withheld. *See* Order at 5-6, 51-52, J.A. at 223-24, 268-69. The FDIC Board did not address any of Landry's claims under *Jencks v. United States*, 353 U.S. 657 (1957). Because the FDIC had not ruled on Landry's *Brady* and *Jencks* claims for the documents that it did *not* review in camera, we ordered the FDIC to produce these documents so that we could decide whether material had been withheld improperly.

Privilege. We begin with Landry's challenges to the FDIC's claims of privilege. His most substantial argument is that the deliberative process and law enforcement privileges were not properly invoked. Assertion of either of

these qualified, common law executive privileges requires: (1) a formal claim of privilege by the "head of the department" having control over the requested information; (2) assertion of the privilege based on actual personal consideration by that official; and (3) a detailed specification of the information for which the privilege is claimed, with an explanation why it properly falls within the scope of the privilege. *See In re Sealed Case*, 856 F.2d 268, 371 (D.C. Cir. 1988) (noting the requirements for invoking the law enforcement privilege); *Northrop Corp. v. McDonnell Douglas Corp.*, 751 F.2d 395, 399 (D.C. Cir. 1984) (same for deliberative process privilege). Landry's argument is that assertion merely by the Memphis regional director of the FDIC's division of supervision, Cottrell L. Webster, rather than by the head of the FDIC, is inadequate.

The argument mistakenly assumes that only assertion by the head of the *overall* department or agency is enough. Our cases hold to the contrary. In *Tuite v. Henry*, 98 F.3d 1411 (D.C. Cir. 1996), we allowed Counsel to the Justice Department's Office of Professional Responsibility, rather than the Attorney General herself, to assert the law enforcement privilege for information obtained during investigations of potentially illegal Justice Department recordings of conversations between a defendant and his lawyer. *See id.* at 1417. Similarly, in *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336 (D.C. Cir. 1984), in rejecting enforcement counsel's assertion of the law enforcement privilege, we implied that officials other than the head of the department could assert the privilege, stating: "the files had not been examined for this purpose by *responsible members or officers* of CFTC." *Id.* at

1342 (emphasis added); *see also Kerr v. United States Dist. Ct. for North. Dist. of Cal.*, 511 F.2d 192, 198 (9th Cir. 1975) (finding common law executive privilege inapplicable because "[n]either the Chairman of the [California Adult] Authority nor the Director of Corrections *nor any official of these agencies* asserted, in person or writing, any privilege in the district court" (emphasis added)), *aff'd*, 426 U.S. 394 (1976). District courts in this Circuit have also allowed lesser officials to assert these privileges. *See, e.g., Koehler v. United States*, 1991 WL 277542, at *5 (D.D.C. Dec. 9, 1991) (allowing the head of the U.S. Army Criminal Investigation Command to assert privilege); *Alexander v. FBI*, 186 F.R.D. 154, 166 (D.D.C. 1999) (implying that affidavits of FBI general counsel or inspector general would have been sufficient if they had provided enough information to assess whether the law enforcement privilege applied).

For these privileges, it would be counterproductive to read "head of the department" in the narrowest possible way. The procedural requirements are designed to "ensure that the privilege[s are] presented in a deliberate, considered, and reasonably specific manner." *In re Sealed Case*, 856 F.2d at 271. As we have seen, built into the requirements is the need for "actual personal consideration" by the asserting official. *Id.* Insistence on an affidavit from the very pinnacle of agency authority would surely start to erode the substance of "actual personal" involvement. *See generally* Note, The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?, 91 Yale L.J. 570, 572 n.18 (1982) (noting widespread belief that official claims of

privilege by department heads are often made after perfunctory review of subordinates' decisions). Further, both privileges advance important goals; the gains from imposing demands in the interest of careful assertion must be balanced against the losses that would result of imposing super stringent procedures. See *United States Dep't of Energy v. Brett*, 659 F.2d 154, 155-56 (Temp. Emer. Ct. App. 1981).

Under our cases, the head of the appropriate regional division of the FDIC's supervisory personnel is of sufficient rank to achieve the necessary deliberateness in assertion of the deliberative process and law enforcement privileges.

We note that decisions involving the more sensitive and absolute privilege for state and military secrets have been more insistent on assertion at the highest level. See, e.g., *United States v. Reynolds*, 345 U.S. 1, 7-8 n.20, (1953) (quoting *Duncan v. Cammell, Laird & Co.*, [1942] A.C. 624, for the proposition that the decision to invoke the state secrets privilege should be taken by "the minister who is the political head of the department"); *Clift v. United States*, 597 F.2d 826, 829 (2d Cir. 1979) (declining to require disclosure where the Secretary of Defense did not invoke the privilege because of a statute criminalizing such disclosure but noting "the Government would be wiser not to put courts to this test in the future"); *Kinoy v. Mitchell*, 67 F.R.D. 1, 9-10 (S.D.N.Y. 1975) (requiring Attorney General himself to lodge a formally sufficient claim of privilege); 26 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure § 5670 (1992). We express no opinion on who may assert that privilege.

Landry's claim that the FDIC fell fatally short by not including the disputed documents in the record is meritless. See *Vaughn v. Rosen*, 484 F.2d 820, 825-26 (D.C. Cir. 1973) (noting the immense and unjustifiable cost to the appellate courts of mandatory review of documents for privileged material). But see *Kerr v. United States Dist. Ct. for North. Dist. of Cal.*, 426 U.S. 394, 405-06 (1976) (noting that in camera review may be used to resolve a privilege dispute).

Landry also argues that the FDIC waived its privileges by initiating this action. He is mistaken. Here he relies on an erroneous reading of *In re Subpoena Duces Tecum Served on the OCC*, 145 F.3d 1422 (D.C. Cir.), *reh'g granted*, 156 F.3d 1279 (D.C. Cir. 1998). In our first pass at the case, we said that the deliberative process privilege was unavailable where "the Constitution or a statute makes the nature of governmental officials' deliberations *the* issue," offering Title VII cases as an archetypal instance. See 145 F.3d at 1424. But when the government in petition for rehearing expressed anxiety that any claim of arbitrary and capricious decisionmaking would necessarily call the government's deliberations into question, we responded by explaining that "our holding . . . is limited to those circumstances in which the cause of action is directed at the agency's subjective motivation." 156 F.3d at 1280. Because an ordinary enforcement action in no way implicates the FDIC's subjective motivations, and Landry makes no credible claims that improper factors motivated this enforcement action, there is no waiver.

Brady/Jencks. In its order the FDIC Board assumed without deciding that *Brady v. Maryland*, 373 U.S. 83

(1963), applies to enforcement proceedings, and though the Board's order did not address *Jencks v. United States*, 353 U.S. 657 (1957), FDIC counsel assures us that the FDIC has the same view of it. Thus we also assume without deciding that both cases apply. Cf. *Communist Party of the United States v. Subversive Activities Control Bd.*, 254 F.2d 314, 327-28 (D.C. Cir. 1958) (holding that in agency adjudications in which the government has not claimed privilege, written reports made at the time of an event must be produced when the credibility of the witness on matters discussed in the report is in question). After reviewing the documents alleged to contain *Jencks* and *Brady* material, we find no reason to disturb the FDIC's order.

We begin with *Brady*. After Landry requested that the FDIC produce all *Brady* materials, the government informed the ALJ and the FDIC Board that it had reviewed the contested documents and had disclosed all exculpatory factual material. Normally we accept the government's representations as to whether documents in its possession constitute *Brady* material. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987) (noting that a prosecutor's decision as to whether exculpatory *Brady* information exists or is material is usually final); *United States v. Lloyd*, 992 F.2d 348, 352 (D.C. Cir. 1993) (same). As the FDIC observed in denying interlocutory review, it takes more than the adverse party's conclusory suspicions to impel the adjudicator to delve behind the government's representation that it has conducted a *Brady* review and found nothing.

Landry's *Jencks* claims have more merit. He argues that the withheld reports by Jerry Cox and G. Martin

Cooper, the bank examiners who testified at his hearing, touch upon the events and activities discussed in their testimony and therefore must be produced. See *Jencks*, 353 U.S. at 668. Because the FDIC concedes *Jencks*'s applicability in this case, Landry has established a prima facie violation if the documents in question cover the same territory as the examiners' testimony. After examining the documents and the examiners' testimony we find that several of them do so. Even so, a privilege might beat the *Jencks* claim. See *Norinsberg Corp. v. USDA*, 47 F.3d 1224, 1229 n.5 (D.C. Cir. 1995) (presuming that, in a license revocation hearing in which the agency had adopted the *Jencks* Act, a witness's opinions in a report that formed part of the deliberative process would be protected from *Jencks* Act disclosure); see also *Communist Party*, 254 F.2d at 327. But see *Jencks*, 353 U.S. at 671-72 (noting that criminal actions must be dismissed when the government chooses not to comply with a court order to produce relevant statements or reports on the ground of privilege). But the FDIC here makes no claim that privilege defeats its *Jencks* obligations – though the ALJ did.

The FDIC does, however, claim harmless error, and the claim is sound. Because these documents merely duplicate other evidence in the record, we find the error harmless even under the strict application of harmless error used to assess *Jencks* violations. See Norinsberg Corp., 47 F.3d at 1230; *United States v. Lam Kwong-Wah*, 924 F.2d 298, 310 (D.C. Cir. 1991).

Evidence Satisfying the Statutory Standard

The statute authorizes a prohibition or removal order:

> Whenever the [FDIC] determines that –
>
> (A) any institution-affiliated party has, directly or indirectly –
>
> . . .
>
> (ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or
>
> (iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;
>
> (B) by reason of the violation, practice, or breach described in . . . subparagraph (A) –
>
> (i) such . . . institution . . . has suffered or will probably suffer financial loss or other damage;
>
> . . .
>
> (iii) such party has received financial gain or other benefit by reason of such violation . . . ; and
>
> (C) such violation, practice, or breach –
>
> (i) involves personal dishonesty on the part of such party; or
>
> (ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such . . . institution. . . .

12 U.S.C. § 1818(e)(1) (1994). That is, the statute requires: misconduct, with certain adverse effects, committed with a culpable state of mind. Landry argues that each of these three factors is absent.

Misconduct. The Board ruled that Landry's actions constituted both unsafe and unsound banking practices under § 1818(e)(1)(A)(ii) and breaches of his fiduciary duty under § 1818(e)(1)(A)(iii). Because there is significant overlap between the two categories, see *Kaplan v. OTS*, 104 F.3d 417, 421 & n.2 (D.C. Cir. 1997) (recognizing that both involve undue risk and that a fiduciary breach can qualify as an unsafe or unsound practice), it is unsurprising that the Board found that most of Landry's misconduct fit into both categories. Landry argues that fiduciary breach is a matter of state rather than federal law, an issue we left open in *Kaplan v. OTS*, 104 F.3d 417, 421 n.2 (D.C. Cir. 1997); see also *Atherton v. FDIC*, 519 U.S. 213, 217-26 (1997), as we do again today: the evidence is enough to show his participation in unsafe or unsound practices.

In *Kaplan* we suggested that an "unsafe or unsound practice" was one that posed a "reasonably foreseeable" "undue risk to the institution." 104 F.3d at 421. Other courts seem to have agreed, using slightly different language. The Third Circuit in *In re Seidman*, 37 F.3d 911 (3d Cir. 1994), for example, said that an "imprudent act . . . pos[ing] an abnormal risk to the financial stability of the banking institution" would qualify. *Id.* at 928. We trust that "undue" risks are abnormal in the banking industry, so we see no difference there. Plunging ahead

with such a risk where its character is "reasonably foreseeable" surely constitutes the imprudence of which the Third Circuit speaks.

The acts attributable to Landry meet both parts of the test. The ALJ's and the Board's findings leave no doubt as to their imprudence. After a thorough review of the transactions we summarized above, the Board correctly concluded: "The list of misguided and aborted projects and relationships that management entered into with minimal information and virtually no expertise is shocking." That these activities exposed the Bank to abnormal risk is also unassailable. Conduct attributable to Landry included substantial involvement in at least one large loan to an uncreditworthy out-of-territory borrower, long-term contracts with consultants whose fees were "proportionately greater than the services rendered," and the use of Bank funds for travel and related expenses in pursuit of breathtakingly irresponsible schemes. In the Bank's weakened condition, these expenditures created an undue and abnormal risk of insolvency. As the FDIC Board found:

> [R]ather than preserve the Bank's few remaining assets, Landry chose to dissipate them in furtherance of his personal takeover of the Bank.
>
> . . . [Landry] failed to disclose that Bank funds were being spent in furtherance of Pangaea and IAIS [a partnership intended to be used for the immigration law scheme]. He failed to disclose the contracts and certain uncreditworthy loans to which he or Jenson had committed the Bank, or the fee-splitting arrangements,

> which benefited him and Pangaea to the Bank's detriment.

Order at 26, J.A. at 243.

Landry argues that the continuing profitability of the Bank during the relevant period forecloses a finding of undue risk, but in so arguing he misconstrues the concept of risk, which is independent of the outcome in a particular case. Just as a loss, without more, does not prove that an act posed an abnormal risk, see *Johnson v. OTS*, 81 F.3d 195, 204 (D.C. Cir. 1996), a profit does not establish its absence.

Effects. The Board found that Landry's misdeeds had the forbidden effects, see Order at 29-30, J.A. at 246-47, because they caused both financial loss to the Bank, see 18 U.S.C. § 1818(e)(1)(B)(i), and personal financial gain for Landry, see *id*. § 1818(e)(1)(B)(iii). The losses consisted of $278,000 in expenses paid by the Bank in promoting Pangaea, and $174,900 in loan write-offs. Order at 29, J.A. at 246. (Although relatively small in relation to large-scale banking transactions, these expenses constitute over 12% of the amount ultimately used to recapitalize the bank.) Landry argues that none of the loans that yielded losses are properly attributed to him, but his method is simply to show that most of the misconduct at issue consisted of actions more directly attributable to his co-incorporators. Section 1818(e) authorizes punishment for actions taken "directly or indirectly." So long as the misconduct at issue meets the stringent preconditions for a removal order it doesn't matter that Landry engaged in many of the proscribed acts only indirectly, though knowingly, and certainly not that others may have been more guilty.

Landry also argues that his expenses cannot be considered losses because they were approved by the appropriate Bank officers and the Bank's shareholders. But these approvals were tainted, even assuming they could otherwise salvage the expenses. Landry's own letters show that he understood that his expenses and those of his co-incorporators were incurred on behalf of Pangaea to the detriment of the Bank, without the shareholders' having understood the fact.

Culpability. The Board found that Landry's misconduct doubly satisfied the culpability prong because it involved both personal dishonesty, see 12 U.S.C. § 1818(e)(1)(C)(i), and willful or continuing disregard for the safety or soundness of the Bank, see *id.* § 1818(e)(1)(C)(iii). The courts of appeals that have examined the question are in agreement that both standards of culpability require some showing of scienter. See *Kim v. OTS*, 40 F.3d 1050, 1054-55 (9th Cir. 1994) (collecting cases). We have no trouble upholding the finding of personal dishonesty. In his letters and deposition testimony Landry repeatedly admitted that he solicited money for Pangaea in the guise of seeking capital for the Bank. See Order at 31-32, J.A. at 248-49. Knowing participation in a scheme that used the Bank's funds for personal gain while representing the scheme as the Bank's own, above-board plan to recapitalize itself qualifies as personal dishonesty. See *Greenberg v. Board of Governors of the Fed. Reserve Sys.*, 968 F.2d 164, 171 (2d Cir. 1992) (finding that failure to disclose insider transactions provided ample support for a finding of personal dishonesty); *Van Dyke v. Board of Governors of the Fed. Reserve Sys.*, 876 F.2d 1377, 1379 (8th Cir. 1989) (accepting the

Board's definition of personal dishonesty which included "deliberate deception by pretense and stealth" and "want of fairness and [straightforwardness]" (alteration in original)).

Landry offers two arguments against this finding. First, he claims that a requirement that a bank control transaction must secure approval by the bank's directors and by regulators "provide[s] the ultimate assurance of fairness that precludes a sanction against Landry," citing *Kaplan*, 104 F.2d at 424. In *Kaplan*, however, we said only that when a director cast a vote in favor of an arguably risky transaction, his anticipation of the need for board and regulatory approval afforded "reasonable assurance that an unfair transaction would not take place." *Id.* There the vote was completely independent of a *later* scheme by *others* to circumvent the OTS's and the S&L board's approval processes. *Id.* at 422. Here, Landry and his co-incorporators' conduct, when viewed ex ante, was far from blameless. Instead, it accomplished the step missing in *Kaplan* by disguising wrongdoing from the regulators and the Bank's board of directors and directly misleading both.

Second, Landry argues, once again, that the Bank's approval of his expenses, and the failure of its board of directors and the FDIC to seek to remove him after fully initially examining the transactions at issue here, proves that he did not act dishonestly. But neither the independent audits commissioned by the Bank after the recapitalization, nor Landry's cooperation with the 1993 examination, eliminate his prior involvement as a co-incorporator and participant in the scheme. His later

honesty, forthrightness, and integrity are to be commended, and his continued employment at the Bank show that its management found that his role in the Pangaea scheme was outweighed by the benefits he offered the Bank. But we do not have the power to substitute our judgment – or the Bank's management's – for that of the FDIC. Once we conclude that Landry's conduct satisfies the statutory preconditions, we must uphold its decision.

Landry also argues that the FDIC reached its decision without taking account of exculpatory evidence. It is well established that the substantial evidence rule requires consideration of the evidence on *both* sides; evidence that is substantial viewed in isolation may become insubstantial when contradictory evidence is taken into account. See *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951); *Johnson v. OTS*, 81 F.3d 195, 204 (D.C. Cir. 1996). But here the evidence to which Landry points is not exculpatory; it shows no more than that Landry had a lesser role than others in the individual actions taken in furtherance of the illegal scheme and that many of his actions were approved by the Bank. The FDIC Board did consider these factors, however, and its findings on all relevant facts are adequately supported by record evidence, including Landry's own statements.

Last, Landry says that the Board failed to provide adequate record citations for its factual findings. Indeed, Landry is correct that several critical findings lack record citation. Such omissions might render an agency's reasoning incomprehensible, possibly requiring a remand. See generally *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("If the administrative action is to be tested by the basis

upon which it purports to rest, that basis must be set forth with such clarity as to be understandable."). But here the FDIC Board explicitly adopted the ALJ's findings of fact which, in turn, contained ample record citations for the factual findings that Landry disputes.

* * *

For the foregoing reasons, Landry's petition for review is

Denied.

RANDOLPH, *Circuit Judge, concurring in part and concurring in the judgment:* I join the court's opinion except for its disposition of Landry's claim under the Appointments Clause of the Constitution. In my view, *Freytag v. Commissioner*, 501 U.S. 868 (1991), cannot be distinguished. The Administrative Law Judge who presided over Landry's case was as much an "inferior Officer" under Article II, § 2, cl. 2 of the Constitution as the special trial judge in *Freytag*. I nevertheless would sustain the FDIC's decision and order because Landry suffered no prejudicial error.

Rather than paraphrase the critical portion of *Freytag*, I will quote it in full:

> Petitioners argue that a special trial judge is an "inferior Office[r]" of the United States. . . .
>
> The Commissioner, in contrast to petitioners, argues that a special trial judge . . . acts only as an aide to the Tax Court judge responsible for deciding the case. The special trial judge, as the Commissioner characterizes his work,

does no more than assist the Tax Court judge in taking the evidence and preparing the proposed findings and opinion. Thus, the Commissioner concludes, special trial judges . . . are employees rather than "Officers of the United States."

"[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by § 2, cl. 2, of [Article II]." *Buckley [v. Valeo*, 424 U.S. 1, 126 (1976)]. The two courts that have addressed the issue have held that special trial judges are "inferior Officers." The Tax Court so concluded in *First Western Govt. Securities, Inc. v. Commissioner*, 94 T.C. 549, 557-559, and the Court of Appeals for the Second Circuit in *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 985 (1991), agreed. Both courts considered the degree of authority exercised by the special trial judges to be so "significant" that it was inconsistent with the classifications of "lesser functionaries" or employees. Cf. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-353 (1931) (United States commissioners are inferior officers). We agree with the Tax Court and the Second Circuit that a special trial judge is an "inferior Office[r]" whose appointment must conform to the Appointments Clause.

The Commissioner reasons that special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, § 2,

> cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. *See Burnap v. United States*, 252 U.S. 512, 516-517 (1920); *United States v. Germaine*, 99 U.S. 508, 511-512 (1879). These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.
>
> Even if the duties of special trial judges [just described] were not as significant as we and the two courts have found them to be, our conclusion would be unchanged [because they may be assigned to conduct other types of proceedings and render independent judgments]. . . . Special trial judges are not inferior officers for purposes of some of their duties . . . but mere employees with respect to other responsibilities.

501 U.S. at 880-82.

There are no relevant differences between the ALJ in this case and the special trial judge in *Freytag*. Both held offices "established by Law," Art. II, § 2, cl. 2; 501 U.S. at 881. In both instances, "the duties, salary, and means of appointment for that office are specified by statute." *Id.*; *see* maj. op. at 1134. Both "take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders." 501 U.S. at

881-82; *Samuels*, 930 F.2d at 986; *see* 12 C.F.R. § 308.5 (defining the ALJ's duties). "In the course of carrying out these important functions," both the special trial judge in *Freytag* and the ALJ in this case "exercise significant discretion." 501 U.S. at 882.

The majority attempts to distinguish *Freytag* on two grounds. Neither survives close attention. First, the majority says that the Tax Court, in reviewing the special trial judge's "non-final decision" in *Freytag*, gave deference to factual and credibility findings pursuant to Tax Court Rule 183(c), whereas the FDIC reviewed the ALJ's decision *de novo*. Maj. op. at 11. It would be odd for the constitutional status of a special trial judge to depend on an internal rule of procedure, particularly since the Tax Court had discretion to pick whatever standard of review it saw fit. *See* 26 U.S.C. § 7443A(c). Odd or not, the Supreme Court in *Freytag* decided that Tax Court Rule 183 and its deferential standard were "not relevant to our grant of certiorari" – and the Court granted the writ, so it explained, in order "to resolve the important questions the litigation raises about the Constitution's structural separation of powers." 501 U.S. at 874 n.3, 873.[1] The

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[1] There was doubt, despite this court's decision in *Stone v. Commissioner*, 865 F.2d 342, 344-47 (D.C. Cir. 1989), whether the Tax Court had authority to provide by rule that it would give deference to special trial judge decisions rendered after an assignment pursuant to 26 U.S.C. § 7443A(b)(4). The Tax Court derived its rulemaking authority from § 7443A(c), but on its face that provision applied only to assignments under (b)(1) through (b)(3). Hence, the petitioners in *Freytag* argued that "Congress did not intend for Tax Court supervision of special trial judge findings and opinions in (b)(4) cases to be appellate in nature." Brief for Petitioners, 1991 WL 521270, at *22, *Freytag v.*

majority's first distinction of *Freytag* is thus no distinction at all. The fact that an ALJ cannot render a final decision and is subject to the ultimate supervision of the FDIC shows only that the ALJ shares the common characteristic of an "inferior Officer." "[W]e think it evident that 'inferior officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond v. United States*, 520 U.S. 651, 663 (1997).

According to the majority opinion, the second difference between this case and *Freytag* is that here the ALJ can never render final decisions of the FDIC, whereas special trial judges could, in cases other than the sort involved in *Freytag*, render a final decision of the Tax Court. *See* maj. op. at 11, 12-13. It is true that the Supreme Court relied on this consideration; the last paragraph of the opinion quoted above indicates as much. What the majority neglects to mention is that the Court clearly designated this as an alternative holding. The Court introduced its alternative holding thus: "Even if the duties of special trial judges [just described] were not as significant as we and the two courts have found them to be, our *conclusion* would be unchanged." 501 U.S. at 882 (italics added). What "conclusion" did the Court have in mind? The conclusion it had reached in the preceding paragraphs – namely, that although special trial judges may not render final decisions, they are nevertheless

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Commissioner, 501 U.S. 868 (1991) (No. 90-762). The Supreme Court avoided deciding the issue by deeming Rule 183 irrelevant to its disposition.

inferior officers of the United States within the meaning of Article II, § 2, cl. 2. The same conclusion, the same holding, had also been rendered in *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 986 (2d Cir. 1991), a decision the Supreme Court cited and expressly approved. *See* 501 U.S. at 881. There the Second Circuit held that a special trial judge performing the same advisory function as the judge in *Freytag* was an inferior officer; the court of appeals did not mention the fact that in other types of cases, the judge could issue final judgments.[2]

That the ALJ in this case is an inferior officer thus follows from *Freytag*. It follows also from the Supreme Court's recognition that the role of the modern administrative law judge "is 'functionally comparable' to that of a judge. . . . He may issue subpoenas, rule on proffers of evidence, regulate the course of the hearing, and make *or*

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[2] The Second Circuit reached this conclusion for the same reasons given in the third full paragraph of *Freytag* quoted in the text:

> The special trial judges are more than mere aids to the judges of the Tax Court. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. Contrary to the contentions of the Commissioner, the degree of authority exercised by special trial judges is "significant." *See Buckley [v. Valeo*, 424 U.S. 1, 126 (1976)]. They exercise a great deal of discretion and perform important functions, characteristics that we find to be inconsistent with the classifications of "lesser functionary" or mere employee. *Cf. Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352 (1931) (United States commissioners are inferior officers).

930 F.2d at 986.

recommend decisions. See [5 U.S.C.] § 556(c)." *Butz v. Economou*, 438 U.S. 478, 513 (1978) (emphasis added). Furthermore, the ALJ, in proposing findings of fact and a recommended decision, which the FDIC reviewed *de novo*,[3] performed functions essentially like those of a federal magistrate assigned to conduct a hearing and to submit proposed findings and recommendations to a district judge. *See* 28 U.S.C. § 636(b)(1)(B). When there is an objection to a magistrate's findings and recommendations, the district judge – like the FDIC – must conduct *de novo* review. *See* 28 U.S.C. § 636(b)(1)(C). Nonetheless, it has long been settled that federal magistrates are "inferior Officers" under Article II, which is why they are appointed by "Courts of Law" under 28 U.S.C. § 631. *See Rice v. Ames*, 180 U.S. 371, 378 (1901); *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 352-54 (1931); *Pacemaker Diagnostic Clinic v. Instromedix*, 725 F.2d 537, 545 (9th Cir. 1984) (en banc).

Because the ALJ in this case was an "inferior Officer," the next question would ordinarily be whether he was duly appointed by the President, a Court of Law, or the Head of a Department, as Article II requires. The FDIC assumed that the ALJ was an inferior officer and ruled that he was properly appointed, having been hired by the Office of Thrift Supervision and assigned to this case by the Office of Financial Institution Adjudication. *See In re*

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[3] *De novo* review does not mean that the ALJ's recommended decisions are without influence. In this case the FDIC "affirm[ed] the recommendation of the ALJ and adopt[ed] his Recommended Decision, Findings of Fact and Conclusions of Law, as discussed herein." *In re Landry*, FDIC-95-65e, 1999 WL 440608, at *4 (FDIC May 25, 1999).

Landry, FDIC-95-65e, 1999 WL 440608, at *28 & n.37 (FDIC May 25, 1999). In this court, the FDIC has given up on this claim. For reasons it did not explain, it expressly abandoned the argument that the ALJ was appointed by the head of a department. *See* Brief for Respondent at 48 n.32. I accept that as a waiver of the defense. It is true that "one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief might be appropriate if a violation indeed occurred." *Ryder v. United States*, 515 U.S. 177, 182-83 (1995). But I do not take this salutary rule to mean that a court may not accept a concession from the party defending the appointment.

The remaining question then is what relief is appropriate. Given the FDIC's *de novo* review and the majority's thorough rejection of Landry's various claims of error,[4] I am persuaded that he suffered no prejudice. The Administrative Procedure Act contains a harmless error rule. *See* 5 U.S.C. § 706; *Doolin Sec. Sav. Bank, F.S.B. v. Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998). The majority suggests that harmless error cannot apply because the constitutional violation is "structural" in nature. But as the majority acknowledges, in none of

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[4] On some points, the FDIC supplied different rationales to reach the same conclusions as the ALJ and on other matters the FDIC reached different conclusions. *See, e.g., In re Landry*, 1999 WL 440608, at *33 (ordering release of certain documents withheld by the ALJ under the due process privilege). In the end, the conclusive evidence came from Landry himself. *See, e.g., id.* at *13-14 (reproducing portions of Landry's resignation letter to the bank).

the "structural" cases it cites was there *de novo* review. *See* maj. op. at 8. Still, the majority reasons that "[i]f the process of final de novo review could cleanse the violation of its harmful impact, then all such arrangements could escape judicial review." *Id.* at 8-9. The majority is not correct about this. The rule in *Ryder*, quoted in the preceding paragraph, requires us to decide the Appointments Clause claim first, before we reach the question of relief. If we had done so correctly here, our decision would have been, in effect, a declaratory judgment that an ALJ sitting on a case such as this had to be appointed by the head of a department. Such a judgment would have been the "practical equivalent" of mandamus, as we said in *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 208 n.8 (D.C. Cir. 1985). If any litigant in the future wished to challenge the ALJ's status before trial, mandamus would lie. Or a litigant could refuse to present evidence before an unconstitutional officer, or refuse to comply with an ALJ's discovery orders, and bring the case here for review after the FDIC acted. *See Morrison v. Olson*, 487 U.S. 654, 668 (1988). Then there would be real prejudice. Here there is none and I therefore join in the denial of Landry's petition for judicial review.

APPENDIX B

FEDERAL DEPOSIT INSURANCE CORPORATION

WASHINGTON, D.C.

In the Matter of MICHAEL D. LANDRY AND ALTON B. LEWIS Individually, and as Institution-Affiliated Parties of FIRST GUARANTY BANK HAMMOND, LOUISIANA (Insured State Nonmember Bank)	ORDER TO REMOVE AND TO PROHIBIT FROM FURTHER PARTICIPATION FDIC-95-65e

INTRODUCTION[1]

The Federal Deposit Insurance Corporation (the "FDIC") initiated this action on April 30, 1996, pursuant to section 8(e)(1) of the Federal Deposit Insurance Act (the "FDI Act"), 12 U.S.C. § 1818(e)(1). A Notice of Intention to Remove From Office and to Prohibit From Further Participation ("Notice") was issued against Alton B. Lewis and Michael D. Landry ("Respondents," "Respondent Lewis," "Respondent Landry," "Lewis" or

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[1] Citations to the record shall be as follows:

Recommended Decision ..... "R.D. at ___."
Transcript ..... "Tr. at ___."
Exhibits ..... "Resp./FDIC Ex. ___."
Exceptions ..... "Landry/Lewis Except. at ___."

"Landry").[2] The Notice alleges that as a result of the Respondents' alleged violations of applicable laws and regulations, unsafe or unsound banking practices, and breaches of fiduciary duty, First Guaranty Bank, Hammond, Louisiana (the "Bank") suffered financial loss or other damage, and there has been actual or potential prejudice to the depositors and gain to the Respondents. The Notice further alleges that these violations, practices and breaches demonstrate the Respondents' personal dishonesty or willful or continuing disregard for the Bank's safety or soundness.

At the time of the activities alleged in the Notice, each of the named respondents was an institution-affiliated party of the Bank as that term is defined in section 3(u) of the FDI Act, 12 U.S.C. § 1813(u): Rick A. Jenson was the Bank's chief executive officer, president, and a member of its board of directors; Scott P. Crabtree was a salaried Bank "turn-around" consultant;[3] Respondent Landry was the Bank's senior vice-president, chief financial officer and cashier;[4] Alton B. Lewis was a member of

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[2] The Notice also named Rick A. Jenson, Scott P. Crabtree, and Danna A. Doucet as respondents. Each stipulated to the entry of an Order of Prohibition prior to the hearing.

[3] In 1988, Jenson and Scott Crabtree entered into a contract with then Bank president, Josh A. Cox, to collaborate and pool their expertise in the purchase of troubled financial institutions. In July 1991, Jenson hired Crabtree as a consultant to the Bank for an initial salary of $1,000 per week. Crabtree held himself out as the Bank's "Director/Merchant Banking Services." He continued to serve in this capacity until his services were terminated by the board of directors in December 1992.

[4] Although not an elected member of the Bank's board of directors, Respondent Landry attended every meeting of the

the Bank's board of directors, chairman of the board's executive committee, chairman of the board's trust committee, the board's secretary, and a member of its incentive stock option, directors loan, compensation and property management committees, as well as a legal counsel to the Bank.

Administrative Law Judge Walter J. Alprin (the "ALJ") convened a hearing in this matter, on October 6, 1997, which continued from day-to-day until its close on October 20, 1997. He issued his Recommended Decision, recommending the entry of an order to remove and prohibit against Respondents on August 14, 1998. Respondents Landry and Lewis filed Exceptions to the Recommended Decision. The matter was transmitted to the Board of Directors of the FDIC (the "Board") for final agency decision on September 30, 1998.

PROCEDURAL HISTORY

During the pre-hearing stage of this proceeding, Respondent Landry challenged the denial of his Motion to Compel Production of Documents in a request for interlocutory review.[5] That request was denied on April

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board of directors and its executive committee throughout the 1991-1992 time period addressed in the Notice. R.D. at 4.

[5] In September 1997, only three weeks prior to the commencement of the hearing, Respondent Landry also filed a Motion to Disqualify the ALJ, or in the Alternative, Motion to Dismiss for Lack of Jurisdiction. Respondent Lewis filed a motion to join in Landry's motion, which was granted at the opening of the hearing. The ALJ's denial of this motion is contained in his Recommended Decision and is affirmed by the Board.

7, 1997, by the Executive Secretary pursuant to delegated authority, upon the advice and recommendation of the Deputy General Counsel, because it did not satisfy the standards for interlocutory review. In giving careful consideration to these discovery issues and to create a better record for review, after submission for final agency decision, it was determined that a more detailed Privilege Log was necessary. Accordingly, the Executive Secretary, on November 30, 1998, pursuant to delegated authority, issued an Order to Reopen Record requiring FDIC Enforcement Counsel to submit a more complete Privilege Log and to permit Respondents to make a supplemental responsive filing.

On November 11, 1998, Respondent Landry filed a Motion to Compel to Complete the Record alleging that certain documents were not provided to the Board of Directors of the FDIC ("Board") as part of the record. FDIC Enforcement Counsel responded on November 30, 1998. Respondent's Motion is denied. Not only is it untimely, being filed almost sixty days after Respondent's Exceptions were filed and almost ninety days after the record was initially certified to the Board, but it is totally frivolous. The Memorandum to the Executive Secretary from the ALJ certifying the record to the Board clearly indicates that the documents which Respondent claims were omitted from the record were, in fact, transmitted to the Board as part of the record. Landry's claim regarding the failure to include privileged documents which were excluded from the proceedings was preserved by his Exception on that point.

On December 9, 1998, Landry filed a Request For Interlocutory Review of the Order to Reopen the Record

("Request For Interlocutory Review"). This Request For Interlocutory Review alleges that the Executive Secretary's issuance of the Order to Reopen Record is not authorized by the FDIC Rules of Practice and Procedure ("FDIC Rules"), and that the Order, itself, violates section 308.40(c)(2) of the FDIC Rules, 12 C.F.C. § 308.40(c)(2), which provides for the Board to render a final decision within 90 days after a case has been submitted for final decision.

Respondent Landry's Request For Interlocutory Review does not meet the criterion for interlocutory review established under the FDIC Rules, 12 C.F.R. § 308.28(b); however, the Board will address the merits of the request at this juncture. First, filings submitted after transmittal of the record to the Board, like Landry's, necessarily invoke the possibility of delay, especially where the record is as extensive as it is in this case. Second, administrative procedures are generally flexible enough to allow agencies discretion to reopen records upon the receipt of new evidence or new arguments. Third, the assertion that the Board cannot act outside the prescribed ninety-day period has been repeatedly rejected by the United States Supreme Court and the United States Courts of Appeal. *See United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993); *United States v. Montalvo-Murillo*, 495 U.S. 711 (1990); *Brock v. Pierce County*, 476 U.S. 253 (1986); *Hendrickson v. Federal Deposit Insurance Corporation*, 113 F.3d 98 (7th Cir. 1997); *Brotherhood of Ry. Carmen Div. v. Pena*, 64 F.3d 702 (D.C. Cir. 1995). The Board reiterates the standard set forth in these cases. Nothing in section 308.40 of the FDIC Rules, 12 C.F.R. § 308.40, or section 8(h) of the FDI Act, 12 U.S.C.

§ 1818(h) divests the Board of its jurisdiction to issue final orders for the failure of the FDIC's Board to fully adjudicate a case within the ninety-day period.

The Board reviewed the Revised Privilege Log submitted by FDIC Enforcement Counsel and determined that privilege was appropriately asserted for forty-four documents. It concluded, however, that the Revised Privilege Log did not identify forty-six (46) documents sufficiently to enable the Board to decide the privilege issue. In order to avoid further delay resulting from a remand of the case to the ALJ, the Board again reopened the record of this case on February 22, 1999, and ordered FDIC Enforcement Counsel to produce the forty-six documents in question for the Board's *in camera* inspection.[6]

On February 26, 1999, Respondent Landry filed a Request for Interlocutory Review of the Second Order to Reopen the Record. He again challenges the delay caused by reopening the record and asserts that the delay and the failure of the ALJ to conduct an *in camera* review at the time Respondent filed his Motion to Compel Production of Documents requires dismissal of the action. Respondent's Request is denied for the reasons set forth above regarding his December 9, 1998 Request For Interlocutory Review. In the interests of justice the Board may

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[6] At the time the original Privilege Log was submitted to Respondents, they received 20,000 pages of responsive documents. *See* Decision and Order on request for Interlocutory Appeal, April 7, 1997, page 2. Since that time, Respondents have received six additional items identified on the Privilege Log and portions of two other items. Accordingly, these documents were excluded from the Board's consideration.

re-open the record and control the flow of an enforcement proceeding to provide a complete record and to otherwise insure a fair and impartial adjudication. *See* 12 C.F.R. §§ 308.4, 308.5. The record of the case was again closed on March 4, 1999.[7]

After *in camera* inspection, the Board sustains the assertion of privilege with respect to all or part of 18 documents. With respect to the remaining documents reviewed *in camera,* the Board finds the assertion of the deliberative process privilege unsupportable, but that the failure to disclose these documents is harmless in light of all the evidence in this case. Therefore, disclosure is not required.

The withheld documents contain no exculpatory material, no information contradicting the documentary or testamentary [sic] evidence properly admitted, and most significantly, contain no probative evidence not already in the record. Many of the documents are totally irrelevant to the charges against Respondents. Other documents relate to the financial condition of the Bank at the time relevant to the Notice, a fact to which both Respondents stipulated, and still other documents provide information which simply duplicates information that is already in the record. None of these documents materially changes the body of

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[7] FDIC Enforcement Counsel responded to Landry's Request for Interlocutory Review of the Second Order to Reopen The Record on March 16, 1999. It was unnecessary to consider this additional pleading. On April 12, 1999 Respondent Landry submitted a Notice of Filing of *Schledwitz v. United States,* No. 97-6057, 1999 WL 104467 (6th Cir. Mar. 3, 1999). *See* footnote 4, Appendix to this Decision and Order.

evidence upon which the ALJ's recommendation, and ultimately the Board's decision, is based. As such, they are merely cumulative. Evidence that is merely cumulative of other evidence establishing the basis for the agency's action does not affect a substantial right and is not a proper ground for reversal. *See United States v. Treadwell*, 760 F.2d 327 (D.C. Cir. 1985), *cert. denied*, 474 U.S. 1064 (1986); *Jane Doe v. Hampton*, 566 F.2d 265 (D.C. Cir. 1977); *Granza v. United States*, 377 F.2d 746 (5th Cir. 1967).

Accordingly, Respondent Landry's Exception to the failure to grant his Motion to Compel is rejected.[8] The Board's analysis of the privilege assertions of FDIC Enforcement Counsel is contained in the Appendix to this Decision and Order.

THE RECOMMENDED DECISION

The ALJ made extensive findings of fact after combing through a large and complicated record. He recommended the issuance of an order of removal and prohibition against Respondents. In support of his conclusions, the ALJ specifically found that the FDIC had

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[8] The Board affirms the ALJ's December 6, 1996 Order on Respondent Landry's Motion For Document Production by Petitioner, to the extent not inconsistent with this Decision and Order. The ALJ recognized that Respondents' discovery requests in this case bordered on the abusive. He appropriately sought to limit the scope of discovery and to prevent the process from becoming a fishing expedition in the government's files. This is a civil administrative proceeding, not a criminal prosecution and not a civil court proceeding. While discovery is permitted, it is limited.

established, by a preponderance of the evidence, each of the elements of an action pursuant to section 8(e) of the FDI Act.

The Board has reviewed the record in its entirety, including the lengthy Exceptions and Memoranda of Law in Support of Exceptions filed by each Respondent and the issues raised by Respondent Landry's Motion for Interlocutory Review. The Board affirms the recommendation of the ALJ and adopts his Recommended Decision, Findings of Fact and Conclusions of Law, as discussed herein.

FACTS

From the late 1980's through the time discussed in the Notice, the Bank was in severe financial straits and had been the subject of substantial regulatory concern. Although the Bank had been placed in the FDIC's capital forbearance program, it had not met its financial expectations and its capital condition was deteriorating. On September 11, 1990, the FDIC issued a Capital Directive pursuant to section 908 of the International Lending Supervision Act of 1983, 12 U.S.C. § 3907, and section 325.6 of the FDIC Rules, 12 C.F.R. § 325.6. The Capital Directive required that the Bank obtain a $4,700,000 capital infusion by January 31, 1991. An examination of the Bank as of April 26, 1991, demonstrated that it was not in compliance with this regulatory directive.[9]

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[9] Pursuant to the requirements of the Capital Directive, the Bank undertook a stock solicitation in October 1990 and received only nominal stock subscriptions, resulting in the

Following the 1991 examination of the Bank, a joint meeting of the Bank's board of directors, the Louisiana Office of Financial Institutions and the FDIC was held. Respondents Landry and Lewis were among those who attended this meeting. The FDIC informed the Bank that it would proceed with an action to terminate its Federal deposit insurance because of the Bank's critically deficient capital position. As of the 1992 examination, the Bank was a candidate for near-term failure. Tr. at 88; FDIC Ex. 3.[10]

It is against this background that Bank senior management, including Respondent Landry and with the participation of Respondent Lewis, began to devise a scheme which would, at the Bank's expense, enable them to recapitalize and take control of the Bank with no investment of their own. The activities engaged in by Respondents are not in dispute. Rather, the motivation for the activities, the responsibility for the activities and the obligation to disclose these activities to the Bank's board

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solicitation's cancellation. As of December 31, 1990, the Bank's primary capital to total assets ratio was 2.89 percent, and the Bank's 1990 earnings were negative $937,000. As of April 26, 1991, the Bank's Part 325 Tier 1 capital to Part 325 total assets ratio was 1.04 percent; the Bank had negative earnings of $363,000, and its adversely classified items equaled 269 percent of the total capital and loan loss reserve ineligible for inclusion in the Bank's Tier 2 capital. As of February 14, 1992, the Bank's Part 325 Tier I capital to Part 325 total assets ratio equaled 1.54 percent, and the Bank's adversely classified items equaled 303.60 percent of its total capital and loan loss reserve ineligible for inclusion in the Bank's Tier 2 capital.

[10] The parties stipulated that the Bank was in "desperately poor financial condition." Tr. at 1533.

of directors are in dispute. The Recommended Decision contains a detailed discussion of the facts which will not be repeated here. The Board will summarize the facts needed to provide the necessary underpinning for its decision.

Many of the relevant transactions are described in detail by Respondent Landry in a June 3, 1993 letter with approximately 500 pages of attachments that he submitted to FDIC Examiner-in-Charge Martin Cooper in response to the FDIC's Confidential Officers Questionnaire ("Landry Letter"), the contents of which he adopted at the hearing. Tr. at 179394; FDIC Ex. 121 and attachments. Although the letter is self-serving in many ways, it is also credible evidence because the facts it describes are generally supported by other documentation and not denied by Landry or Lewis.

To summarize: Respondent Landry, Jenson and Crabtree attempted to appropriate the Bank by creating a bank holding company which they would control, Pangaea Corporation ("Pangaea"), under the guise of Bank recapitalization efforts. The takeover scheme contemplated that Respondent Landry, Jenson, and Crabtree would control the Bank through their seventy percent interest in the holding company, which would obtain eighty percent of the Bank's stock. Landry, Jenson, and Crabtree would exercise control without any investment in Pangaea or the Bank. In furtherance of this plan, Respondent Landry, appearing to act on behalf of the Bank, with the knowledge and assistance of Respondent Lewis, and with no disclosure to the Bank's board, engaged in a number of improper activities. Most significantly, no disclosure of

the true purpose of Pangaea and the intent of its incorporators (Jenson, Crabtree and Landry) was made to the Bank or to its regulators. A partnership entity consisting of Landry, Jenson and Crabtree and Respondent Lewis' law firm was designed to solicit international funds for Pangaea without disclosure to the board. The partnership was named Inter American Investment Services ("IAIS"). The Bank entered into costly service contracts with Funding Placement Services and Dakin & Willison; entered into costly employment contracts with William White Bolles and Richard Crabtree, Scott Crabtree's father; made high-risk loans to Pangaea investors Robert F. Smith and Robert G. Smith; and absorbed the costs and travel expenses of trips to Vancouver, British Columbia, and Quito, Ecuador associated with the capitalization of Pangaea.

A. Formation of Pangaea

In August 1991, Respondent Landry, Jenson, and Crabtree produced a booklet entitled "Pangaea: Finance With a Global Perspective" ("Pangaea Booklet") which revealed their strategy for a management takeover of the Bank. The Pangaea Booklet discussed the formation of a corporate entity to be organized as a bank holding company, separate from the Bank, whose principals were Respondent Landry, Jenson, and Crabtree. The principals were to acquire 70 percent of the common stock in Pangaea. Outside investors would receive preferred stock in Pangaea and an option for 30 percent of Pangaea's common stock. Pangaea would own 80 percent of the common stock of the Bank. Landry, Jenson and Crabtree were to receive their 70 percent ownership in Pangaea, and

thereby control the Bank, without any personal investment for their shares of Pangaea. (FDIC Ex. 11). The intention to acquire control of the Bank is explicitly set forth in the first paragraph of the accompanying document and is thereafter repeated.[11]

At an August 8, 1991, executive meeting of the Bank's board of directors, attended by Respondent Landry (and Jenson), Jenson presented the "Pangaea Plan" as a Capital Enhancement Plan ("CEP"). No mention was made of a management takeover of the Bank, but the CEP was presented as a plan that would establish Pangaea as a "phantom bank" to engage in activities that the Bank could not and to raise capital for the Bank. The board was told that the CEP would cost the Bank $25,000 or less, and it was unanimously approved. Twenty-five copies of the Pangaea materials were then mailed by the Bank to persons in Vancouver, British Columbia who had been included on a list of the wealthiest persons in the world. Landry, Jenson and Crabtree then visited the Vancouver recipients from August 19-24, 1991, as previously arranged before the August 8 meeting.

On August 15, 1991, Lewis learned of the Pangaea proposals at a meeting with Jenson.[12] Lewis was asked to

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[11] Respondent Landry considered the Pangaea Booklet a stock offering document. FDIC Ex. 121 p. 1.

[12] Lewis was not present at the August 8, 1991 meeting of the board of directors, but he later signed the minutes of the meeting as secretary to the board (FDIC Ex. 71). On August 15, Lewis approved the distribution by Federal Express of 25 Pangaea packets to potential investors in Vancouver. (Tr. at 1248-1250; FDIC Ex. 121, pg. 2; FDIC Ex. 121, Attachment 2).

reserve the corporate name "Pangaea" with the Secretaries of State for Delaware, Texas, and Louisiana. On August 22, 1991, Lewis reserved the name in Louisiana. At his office he "calendared" the reservation for renewal upon its regular expiration, prepared his file on Pangaea, showing the Bank as the client, and charged the reservation of the name to the Bank (Tr. at 986; Tr. at 1249, 1255-56, 1275-76; FDIC Ex. 300).

On August 26, 1991, the Bank's executive committee met with Respondent Landry, Respondent Lewis and Jenson in attendance. Jenson spoke about the Vancouver trip and the "Pangaea Plan," and he distributed copies of the Pangaea Booklet, all of which were collected at the end of the meeting. Respondent Lewis thumbed through the booklet at the meeting, but he did not keep a copy. At no time during the meeting did Lewis comment upon the plans for Landry, Jenson and Crabtree to incorporate Pangaea as a bank holding company and ultimately own the Bank through their ownership of Pangaea.

Meanwhile, the Bank wrote a letter dated August 12, 1991, to the FDIC, which included a copy of the CEP and draft copy of the Pangaea Booklet, informing it of the recapitalization plan. The CEP proposed that the Bank solicit $16,000,000 in capital for a holding company named "Pangaea Corporation" to recapitalize the Bank. Of the $16,000,000, solicited, $7,500,000 would be injected into the Bank as capital. The proposal called for $2,500,000 of the $7,500,000 to be injected through the purchase of the Bank's common stock, and $5,000,000 to be used for the purchase of preferred stock to be issued which would carry a guaranteed 10 percent dividend

rate. Of the $8,500,000 balance remaining (from the original $16,000,000) $6,500,000 would be used to form a limited partnership which would buy other real estate from the Bank's asset portfolio, and $2,000,000 would be used to pay holding company expenses and finance the other ventures proposed in the CEP. (Tr. at 80-83; FDIC Ex. 14, pgs. 8-10; FDIC Ex. 71).

By letter dated August 30, 1991, the FDIC informed the Bank's board of directors that the FDIC believed the CEP was inadequate because it "makes no provision for a necessary injection in the short term and provides what appears at best to be a highly speculative prospect for large capital flows from international and corporate sources in the longer term. Little reliance can be placed on prospects for capital from local investors or merger partners as these have been unsuccessfully explored for at least the past two years." The FDIC notified the Bank that it was recommending the initiation of deposit insurance termination procedures. (Tr. at 84-87; FDIC Ex. 296, pg. 1).

At a September 11, 1991, meeting of the Bank's board of directors, attended by both Respondents, the August 30 letter from the FDIC was discussed. Respondent Lewis did not inform the board that he had already reserved the corporate name "Pangaea Corporation." Respondent Landry did not inform the board that he and Jenson and Crabtree, not the Bank's current shareholders, would be Pangaea's controlling shareholders. (Tr. at 720-722; FDIC Ex. 73; FDIC Ex. 296.)

B. Inter American Investment Service

In August 1991, changes in U.S. immigration laws were proposed which would allow foreign nationals to receive United States citizenship if they invested $1 million in a new business venture in this country that provided ten or more new employment positions. Respondent Landry, Jenson, and Crabtree conceived of a partnership, IAIS, in which they, together with Respondent Lewis' law firm, Cashe, Lewis, Moody & Coudrain ("CLMC"), would be equal partners.[13] They also planned that a corporation, "Amer Invest," would be formed to be the general partner. CLMC's contribution to the partnership was to be the performance of legal work. Respondent Landry, Jenson and Crabtree intended to use this vehicle to find foreign nationals seeking to obtain U.S. citizenship under the new legislation. The proposed legislation was similar to Canadian immigration law. Thus, the trip to Vancouver enabled Respondent Landry, Jenson and Crabtree to make contacts concerning IAIS. (FDIC Ex. 121; Lewis Ex. 41, pg. 34).

The proposed changes in immigration law also played a role in the Pangaea Plan, as it was described in the Pangaea Booklet, and they were a component of the CEP forwarded to the FDIC. Respondent Lewis began reserving the corporate and trade names "Inter American Investment Services" and "Amer Invest" with the Louisiana Secretary of State in October 1991, and he continued to reserve these names through September 1992. (FDIC

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[13] The Landry Letter gives the address of IAIS as 400 Thomas Street, Hammond, LA, which is the Bank's address. FDIC Ex. 121.

Ex. 265; Lewis Ex. 41.) Respondent Lewis had a CLMC associate prepare a legal memorandum on the proposed changes in immigration law, a copy of which was disseminated to members of the CLMC firm on October 28, 1991 (Tr. 1058-1061; 1267; FDIC Exs. 131, 131a.). The CLMC firm did not bill the Bank for the legal work on behalf of IAIS or Amer Invest.

Respondents Landry and Lewis attended the Bank's board meeting on November 14, 1991, at which Jenson presented a draft trust agreement, involving the Bank's Trust Department, which would be used by a partnership to attract $1 million each from foreign nationals who wanted to participate in the immigration scheme. The minutes of the meeting do not identify the partnership. (Tr. at 725, 136-137; FDIC Ex. 76.) Bank director Bill Hood testified that he thought the partnership was to be between Jenson and Crabtree, that Lewis was to do the legal work for them, and that none of the expenses would be paid by the Bank. (Tr. at 1725-26.) The chairman of the board, Mary Ann Cefalu, testified that she did not hear of IAIS until sometime well after the November 14, 1991 meeting, and the secretary taking notes of the meeting testified that the only role described for Lewis' law firm was assisting the Bank to prepare proper legal documents for use by its Trust Department. Tr. at 725, 1749, 1778. The Bank's Trust Department had been dormant since 1984.

C. Funding Placement Services

On December 6, 1991, the Bank agreed to pay Funding Placement Services ("FPS") the sum of $20,000 under a Business Consultant's Agreement to solicit individuals,

partnerships, corporations, and other business entities to provide services in preparing a preferred stock offering for the Bank. According to the Landry Letter, however, these services were intended to help carry out the Pangaea Plan, not further the Bank's interest.[14] Tr. at 148-49, 163-64; FDIC Exs. 121, 151.

In April 1992, after meeting with individuals associated with FPS, Jenson and Crabtree met in Los Angeles with representatives of an entity named "Blue Rose Investors" ("Blue Rose"). The Bank paid $15,000 to FPS for the introduction to Blue Rose, using a check signed by Respondent Landry. There was a fee splitting agreement between Blue Rose and FPS, and there was also a fee splitting agreement between FPS and Pangaea. Tr. at 547; FDIC Ex. 121 Attachment 4, pg. 4; FDIC Exs. 4, 151 and 151a. The FPS connection led to other questionable transactions, examples of which are discussed below.

1) Robert F. Smith Loan

Notwithstanding the Business Agreement between the Bank and FPS, a Memorandum of Understanding ("MOU") dated May 5, 1992, between Pangaea and FPS established that loan fees and commissions would be evenly divided between the Pangaea and FPS. FDIC Ex. 151. The Bank extended $450,000 in credit to one Robert F.

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[14] The Business Consultant's Agreement between the Bank and FPS refers to the preparation of documents for a private placement offering. The Landry Letter states that Landry received instructions to wire FPS $20,000 "to write a preferred stock offering for the Pangaea Corporation concept." FDIC Ex. 121 p.3.

Smith, an out-of-territory businessman introduced to the Bank through FPS. Shares of common stock in USA Waste Services were provided as collateral. This stock was subsequently discovered to be restricted by Securities and Exchange Commission and Internal Revenue Service liens or subject to rules that limited the way it could be liquidated. The stock was not in the Bank's possession at the time the loan was made. Tr. at 548-49; FDIC Ex. 4, pg. 2-a-10, FDIC Ex. 275. As described by the ALJ, "other peculiar and unusual circumstances" surrounded this loan:

> Although Landry was not a loan officer, he acted as the loan officer for this loan;
>
> Landry insisted upon acting as an intermediary between senior Bank loan officer Mike Lofaso and the borrower;
>
> The senior Bank loan officer handling the loan was opposed to the credit's extension and refused to present the loan application to the Bank's loan committee;
>
> Landry presented the loan application to the Bank's loan committee while the senior Bank loan officer was on vacation;
>
> Landry had never presented a loan to the loan committee prior to the Robert F. Smith loan;
>
> The amount of the loan request, $450,000, was unusually large, the borrower was located outside the Bank's lending area and otherwise unknown to the Bank, and the credit bureau reports on the borrower disclosed a number of judgments and liens.

* * *

> [T]he loan committee tabled the loan, and it was subsequently approved only upon Jenson's personal lending authority. R.D. at 32-33.

The loan was classified "substandard" at the April 1993, examination.

2) Robert G. Smith Loan

On March 24, 1992, the Bank loaned $13,000 to an FPS principal, Robert G. Smith, for the purchase of a used 1980 Porsche. The loan was made at about the time Pangaea entered into the fee splitting MOU with FPS. The credit bureau report on Robert G. Smith disclosed that he had two different social security numbers, and an investigator hired by the Bank could not verify Robert G. Smith's given address. Nonetheless, Respondent Landry, Jenson and Crabtree pressured Bank employees into presenting the loan, which was approved. The loan went into default and was charged off by the Bank.

3) Place Vendome

On April 2, 1992, Jenson authorized a loan of $450,000 to GABL Corporation, whose principals were Byford Beasley (who participated in other Pangaea activities), George Russell, Adolph LaPlace, and Lenny LaPlace. The loan was placed through FPS. It was a loan for the development of a shopping mall in Baton Rouge, Louisiana, named Place Vendome. Respondent Landry acted as either escrow agent or trustee for several wire transfers of funds for Place Vendome between April 17,

1992, and June 9, 1992. Place Vendome was not a customer of the Bank and did not have a relationship with the Bank. Thus, it did not have a trust account at the Bank into which funds could be deposited until the Bank, as trustee, was instructed regarding distribution of funds. Respondent Landry agreed, nevertheless, to receive funds for Place Vendome and pass the funds to third parties pursuant to directions provided by Place Vendome principals. In his role as transfer agent, Respondent Landry issued checks and wire transfers on Place Vendome's behalf and at its direction. Jenson negotiated a $10,000 fee to be paid to the Bank by Place Vendome for these services, but the Bank never received the $10,000 fee or payment for the costs it incurred in issuing checks and wire transfers for Place Vendome. Landry Answer, Par. 35.

On May 1, 1991, Place Vendome was placed under a temporary injunction by the U.S. District Court for the Eastern District of Louisiana, prohibiting Place Vendome's "disposition, transfer, pledge, encumbrance, assignment, dissipation, concealment or other disposal whatsoever of any funds or assets . . . " and the "pledge, transfer, encumbrance or assignment of assets in connection with the financing of the Place Vendome Mall project." Notice, Par. 27(a). Respondent Landry had notice of the temporary injunction and knew that the payments on Place Vendome's behalf from April to June 1992 were in direct violation of its terms. As a result of these violations of the May 1, 1991 order, the Bank and Respondent Landry were sued by Place Vendome's receiver in Bankruptcy. The lawsuit alleged that Respondent Landry and the Bank wrongfully transferred $649,000 in violation of

the order. In 1995, the Bank paid $70,000 to the Place Vendome receivership in settlement of the lawsuit. Landry Answer, Par. 35.

D. Other Transactions

Pangaea Corporation, IAIS, Funding Placement Services and the Respondents, acting in concert with Crabtree and Jenson, undertook numerous additional transactions funded by the Bank. These included: a monthly retainer payment ultimately totaling approximately $69,000 to Dakin & Willison to introduce the IAIS concept to various investment groups; an automobile securitization program involving automobile loan contracts from outside the Bank's lending area, which would enable the purchasers of the securitization to set their own interest rate; a contract with William White Bolles under which Bolles received a monthly fee of $15,000 and was granted a non-exclusive right to contact potential investors and raise capital either for the Bank or for a holding company such as Pangaea Corporation;[15] a July 1992, contract between the Bank and Richard Crabtree, Scott Crabtree's father, whereby Richard Crabtree received a $6,000 payment for one month of non-exclusive representation of the Bank in contacting potential

[15] At about the time the Bank entered into the agreement with Bolles, it extended credit to him totaling $40,000. A letter in the Bank's loan file from Bolles stated that he was subject to an outstanding judgment of $26,000,719 for violation of the Racketeering Influence and Corrupt Organization Act ("RICO"). The full amount of this loan and the accrued interest were classified "loss" by the FDIC during its April 1993 examination and were ultimately charged off by the Bank.

investors. In addition, Richard Crabtree was granted pre-approved expenses in connection with his retention to obtain deposits for the Bank's Trust Department and ten percent of the earnings for ten years by the Bank's Trust Department on accounts established as a result of his efforts. FDIC Exs. 277, 121.

During the summer of 1992, Respondent Landry, Jenson, Byford Beasley (of GABL Corporation) and a man named Nix and his girlfriend traveled to Quito, Ecuador to investigate a capital "leverage" scheme.[16] Landry had been told that in Ecuador one could invest $200,000 in U.S. dollars and in six weeks convert the amount to a million dollars. In correspondence between Landry and Jenson, using Pangaea letterhead,[17] with Ed Neal of Quito, Ecuador, the terms of an agreement were discussed whereby the Bank would loan $3 million to Pangaea Corporation, enabling it, through the use of this Ecuadoran currency scheme, to accumulate sufficient funds to purchase the common stock of the Bank. Thus, according to Landry, "the Bank would be recapitalized with control placed in the hands of the incorporators of Pangaea Corporation." Tr. at 589-591; FDIC Ex. 174. The security for the loan was to be a pledge of all the shares of Pangaea and the Bank shares thereafter to be purchased with the proceeds from this transaction.

Another letter from Respondent Landry to Ed Neal stated:

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[16] The Bank also paid for Landry's travel to Warsaw and London with Beasley. R.D. at 35; FDIC Ex. 121.

[17] The address of Pangaea Corporation is the address of Respondent Lewis' law firm.

> *Pangaea Corporation will grant* up to a 15 percent interest in its current outstanding common equity as of June 15, 1992, to a trust held by Rothschild Trust on behalf of you or your assigns, heirs or affiliates. Such stock will be granted incremental in three installments as the preferred stock investment described in item 1 is funded. For each $2 million in preferred stock, Pangaea Corporation will grant 5 percent of the current June 15, 1992, outstanding common equity. *For such consideration, you agree not to support any action now or in the future that would result in the dilution of the ownership interests of Mr. Rick Jenson, Mr. Michael D. Landry and Mr. Scott P. Crabtree 85 percent collectively, unless support of such action is executed by Mr. Jenson and Mr. Landry as duly authorized proxies on your behalf.*

(Emphasis added.) Tr. at 473-474; FDIC Ex. 121, pg. 9-10; FDIC Ex. 142.) The Bank did not receive any benefit from this expedition to Ecuador and incurred travel expenses in the amount of $20,000. The Bank paid the travel costs of the non-Bank personnel who accompanied Respondent Landry and Jenson, and these were not reimbursed.

While all of this activity was occurring, offers were being made to purchase the Bank.[18] The first interest expressed was in the Fall of 1991 from Fai H. Chan, an Oregon bank owner looking to expand his financial enterprises. Chan and Jenson negotiated over many months,

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[18] The FDIC agreed to delay initiation of its insurance termination proceedings while these proposed recapitalization plans were being discussed by the Bank's board of directors.

but Jenson was never satisfied with the deal. In September 1992, Jenson identified a group headed by Victor Weygard, which intended to recapitalize the Bank using a modification of the Pangaea Plan. Finally, Marshall Reynolds offered to invest $3,000,000 in the Bank and the board of directors approved the Reynolds recapitalization plan in its entirety on December 29, 1992, and it was subsequently approved by the FDIC.

DISCUSSION

To meet its burden in this prohibition action, FDIC Enforcement Counsel must show that the Respondents have engaged in prohibited conduct, the effect of which was to cause the Bank to suffer financial loss or damage, to prejudice or potentially prejudice the Bank's depositors, or to provide financial gain or other benefit to the Respondents. FDIC Enforcement Counsel must also prove that such misconduct evidences personal dishonesty or demonstrates a willful or continuing disregard for the safety or soundness of the bank. 12 U.S.C. § 1818(e)(1). As set forth in the ALJ's Findings of Fact, all of which are amply supported in the record and which the Board adopts, FDIC Enforcement Counsel have presented substantial evidence with respect to both Respondents sufficient to sustain this action.

FDIC Enforcement Counsel have proven that Respondents engaged in misconduct by: (1) using Bank funds for the personal benefit of the Pangaea principals and their proposed IAIS partners; (2) extending credit to out-of-territory borrowers on terms and under circumstances that resulted in the loans being adversely classified by

bank regulators or written off by the Bank; (3) engaging in unsafe or unsound practices and breaches of fiduciary duties arising from failures to inquire or make disclosure regarding activities known to be in the interest of Respondents and not in the interests of the Bank; and (4) failing to disclose material changes in the Bank's operations in compliance with the FDIC's disclosure requirements. Such misconduct resulted in financial gain to the Respondents, loss to the Bank and potential prejudice to the depositors. The record conclusively demonstrates that Respondents' actions involved personal dishonesty and that they acted with willful or continuing disregard for the safety or soundness of the Bank.

Respondent Landry, in conjunction with other senior members of Bank management, engaged in an unusual number of activities – some of which can only be described as bizarre – in an effort to secure control of the Bank and to otherwise benefit themselves.[19] Although many of these activities are rationalized by Landry as indirect methods of recapitalizing the Bank, it was found by the ALJ – and the Board concurs – that Landry's primary goal was to generate capital for Pangaea and recapitalize the Bank through Pangaea, thereby enriching the Pangaea incorporators, himself among them. One of the objectives of Pangaea was to have the Bank pursue non-traditional banking activities. The list of misguided

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[19] Only Respondent Landry was a Pangaea incorporator who would directly benefit from the Pangaea takeover of the Bank. As Bank counsel, however, Lewis and his law firm would benefit directly from the fees generated by incorporation and indirectly from the takeover.

and aborted projects and relationships that management entered into with minimal information and virtually no expertise is shocking. Respondent Landry, together with Jenson and Crabtree, sought and used Bank funds to pay for advice and ideas, which were, at best, unrealistic as vehicles for the generation of sorely needed capital. These included: fee-splitting agreements on behalf of Pangaea with FPS and with Blue Rose; causing the Bank to grant large loans to uncreditworthy out-of-territory borrowers, over the dissent of bank middle management, from which Respondent Landry benefited as a Pangaea principal, through the fee-splitting arrangements; causing the Bank to pay for long-term contracts with consultants (including Scott Crabtree's father) to market the Pangaea concept and the Bank's dormant Trust Department; and causing the Bank to expend funds for travel and related expenses in connection with these activities. The Board has carefully reviewed the factual allegations of the Notice and Respondents' proposed Findings of Fact. There is very little disagreement regarding the material allegations. To the extent that disagreement exists, Respondent Landry has misconstrued testimony, inaccurately described events, or relied on testimony taken out of context. In light of the Landry Letter detailing these numerous schemes, it is virtually impossible for Respondent Landry to deny his participation. Landry's resignation letter to Jenson, dated September 16, 1992, further describes Landry's role and the activities of Bank senior management:

> This letter is to advise you of my immediate resignation. . . . You have hired numerous "experts" who, for a sizable fee, offered to assist

> us in our efforts to capitalize Pangaea Corporation and acquire controlling interest of First Guarantee Bank. Funding Placement Services, Richard Crabtree, Dakin & Willison, William Bolles, and others – most have come and gone. All were contracted with on trips or in meetings where I was not present. In most cases, the amount of dollars spent has been proportionately greater than the services rendered. . . .
>
> Whether or not I have been intended to be the scapegoat all along, I do not know. I only know that I can no longer condone the "self dealing" nature of the transactions which have been entered into for the good of Pangaea Corporation at the expense of First Guaranty Bank. Nor can I endorse any transaction to our Board of Directors without the complete and full disclosure of the potential "self dealing" transactions into which we have entered. . . . FDIC Ex. 119.[20]

Of necessity then, Respondent Landry attempts to shift the blame to other, allegedly more central characters in the drama. Section 8 of the FDI Act, however, does not require that the FDIC only act against the worst wrongdoer. This Board has frequently been faced with cases involving multiple respondents. Degree of participation or culpability is not an issue. Where the statutory criteria are met, as they are here, an order to remove and prohibit is appropriate. *See In the Matter of Irwin Weitz*, FDIC-93-91e, 1 FDIC Enf. Dec. ¶ 5244 (November 1997).

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[20] Landry is still working for the Bank. His resignation (FDIC Ex. Nos. 119, 120) was not accepted by the board.

Of the two respondents remaining in this case, Respondent Landry is the one who most actively participated in the transactions and schemes intended to place control of the Bank in the hands of the Pangaea incorporators. Respondent Lewis portrays himself as a mere passive agent of his client, the Bank. He protests that he has been "simply lumped together with those who had actively formulated and enacted a plan to take over [the Bank] for no consideration in detriment to the shareholders of [the Bank]." Lewis Memorandum in Support of Exceptions to Decision at 6. Lewis argues that a director of a corporation is far less culpable than its chief executive officer or its chief financial officer. *Id.* at 7. He asks several times why he would have "any higher duty to investigate than any other member of the Board." *Id.* This argument belies the fact, however, that Respondent Lewis was not merely just "another" director.[21] No one on the Bank's board held more positions of trust and responsibility than Lewis. Given the long list of committee chairmanships and positions Lewis held, although he was not involved in the day-to-day operations of the Bank,

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[21] Mr. Lewis asserts that "the duty of investigation that is imposed on [him] by [the ALJ's decision] is ridiculous. If this duty is imposed on directors of banks in the United States, then it eliminates the entire need for any executive officers whatsoever." *Id.* at 8. In his hyperbole Lewis forgets that the Bank was *in extremis*. A director's duty to investigate and to report is well established in the law and is indeed heightened in a severely under capitalized institution. *In the Matter of Harold Hoffman*, FDIC-88-156b&c, FDIC Enf. Dec. Bound Vol. 2, ¶ 5140, A-1489, 1494 (1989), *aff'd*, 912 F.2d 1172 (9th Cir. 1990).

there was almost no aspect of the Bank's policies, practices or activities in which he was not involved. Respondent Lewis was privy to a wealth of "inside" information that no other director had.

As stated by the ALJ, "the linchpin of the case against Lewis as an errant director is that he did not recognize that being a bank director is a responsibility, not a sinecure. It requires vigilant stewardship of the Bank, and an understanding of the limits of conflicting interests." R.D. at 76. Lewis' statement in his own Brief is a perfect example of his erroneous beliefs. "[W]e are not dealing with what Alton B. Lewis 'should have known' but what he knew and did." Lewis Br. at 2.[22] The law places a greater burden than this on Mr. Lewis, and makes him liable for what he knew or should have known as a prudent director. "The greater the authority of the director or officer, the broader the range of his duty, the more complex the transaction, the greater the duty to investigate, verify, clarify and explain." *In the Matter of James E. Baker*, FDIC-92-86e, FDIC Enf. Dec. (Bound Vol. 2) ¶ 5199, A-2277 (1993). The "ostrich" defense of hiding one's head in the sand is unavailable to bank directors. It is no defense, therefore, for a director to merely state, as Lewis does, that he "didn't know anything was going on." *Id.* "At the very least, the Bank had a right to know all of the facts . . . known to its counsel which may be harmful to

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[22] Respondent Lewis admits that he did not read the minutes of the board of directors before he signed them as secretary. He also claimed to have never done more than "thumb through" the Pangaea booklet even though he knew it was intended as a road map to the critical recapitalization of the Bank. Tr. at 714-716, 1253, 1402-1403, 1700.

it," *United States v. Cassiere*, 4 F.3d 1006, 1022-23 (1st Cir. 1993). Because Lewis was counsel to the Bank and served in so many board capacities, he had knowledge of legal requirements and of events that other outside directors did not possess, and upon which, as a director, he had a duty to act.

A. Misconduct

As noted by the ALJ, the distinction between unsafe and unsound practices and breaches of fiduciary duty is not a clear one in this case. Respondents, however, engaged in so many inappropriate activities that it is not really necessary to draw fine distinctions. A breach of fiduciary duty by a director or officer to the Bank is *per se* unsafe and unsound. *First National Bank of Lamarque v. Smith*, 610 F.2d 1258, 1265 (5th Cir. 1980); *Independent Bankers Ass'n of America v. Heimann*, 613 F.2d 1164, 1168 (D.C. Cir. 1979) *cert. denied*, 449 U.S. 823 (1980); *In the Matter of Robert Stoller*, FDIC-90-115e, FDIC Enf. Dec., Bound Vol. 2, ¶ 5174, A-1865 (1992). Nonetheless, the ALJ makes findings more than adequately supported by the record that Respondents Landry and Lewis each engaged in unsafe and unsound practices and breaches of fiduciary duty. *See* R.D. at 56-78.

The fiduciary duties of institution-affiliated parties to a bank for the purposes of section 8(e) of the FDI Act are established by Federal law.[23] Directors, officers and

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[23] In administrative enforcement proceedings under section 8 of the FDI Act, the fiduciary duties owed to federally insured financial institutions derive from doctrines that have been well

institution-affiliated parties of a bank owe duties of care and loyalty, which require that they exercise a high degree of vigilance and honestly and fairly deal with the bank. *Brickner v. FDIC*, 747 F.2d 1199 (8th Cir. 1984). The FDIC Policy "Statement Concerning the Responsibilities of Bank Directors and Officers," 2 FDIC Law, Regulations, Related Acts at 5369 (April 30, 1993) states:

> The duty of loyalty requires directors and officers to administer the affairs of the bank with candor, personal honesty and integrity. They are prohibited from advancing their own personal or business interests, or those of others, at the expense of the bank.
>
> The duty of care requires directors and officers to act as prudent and diligent business persons in conducting the affairs of the bank.

The application of bank funds for one's own use and benefit – the most obvious form of self-dealing for an institution-affiliated party – has long been held to be a breach of a director or officer's duty of loyalty to a financial institution. In *Stoller*, the Board stated: "[W]hen directors and officers place their personal interests above those of the corporation, or utilize corporate resources for personal gain, they have committed a serious breach of their fiduciary duty." FDIC Enf. Dec., Bound Vol. 2 at A-1870; *accord*, *Pepper v. Litton*, 308 U.S. 295, 311 (1939). Self-dealing has been identified as an unsafe or unsound practice because of the conflict it creates between the

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established in a number of classic cases. *See Briggs v. Spaulding*, 141 U.S. 132 (1891), *Geddes v. Anaconda Mining Co.*, 254 U.S. 590, 599 (1921) and *Pepper v. Litton*, 308 U.S. 295, 306 (1939).

interests of the institution and the individual, *First National Bank of Lamarque*, 613 F.2d at 1168.

Respondents Landry and Lewis repeatedly breached their duties of loyalty and care to the Bank. Indeed, Landry does not deny this, and the Landry Letter provides a written chronicle of the multiple occasions on which he placed his personal interest in acquiring the Bank ahead of his duty to seek the capital the Bank so critically needed. Tr. at 1693-97; FDIC Exs. 119, 120, 121, 181 (a), pgs. 196-199, 181(c), pgs. 67-69. The Board concurs with the ALJ's statement that "from the moment he departed for Vancouver, British Columbia, through September 1992, all of Landry's capital raising efforts were driven by his roles as a partner in Inter American Investment Services and as a Pangaea principal. His final letter of resignation from the Bank seeks neither to disclaim nor excuse his conduct," R.D. at 70, but rather to shift the blame to others. FDIC Ex. 119.

Respondent Landry's actions in championing and forcing the extension of a $450,000 loan to Robert F. Smith, an out-of-territory, extraordinarily uncreditworthy borrower, over the strenuous objection of the loan review committee, is one example.[24] In addition to the

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[24] This example is not exclusive. The following remarkably poor loans also were entered into with Landry's assistance, at the least. Each is connected to some fee-splitting arrangement for the benefit of Pangaea:

-$13,000 was extended to Funding Placement Service's principal, Robert G. Smith. The loan officer could not verify the validity of Smith's two social security numbers, and an investigator hired by the Bank could not confirm Smith's business address and existing address.

unfavorable features of the loan, it was subject to a fee arrangement with FPS, which, in turn, had entered into a fee-splitting arrangement with Landry on behalf of Pangaea. It is obvious that the Bank's interest was not foremost at the time this loan was made, and this was confirmed by the "substandard" classification the loan received during the 1993 examination.

Landry signed checks and paid Bank funds to Dakin & Willison, William White Bolles, Richard Crabtree, FPS, and Blue Rose in furtherance of his efforts to find capital for his personal acquisition of the Bank. It is clear from the Landry Letter that he knew that none of these arrangements were for the benefit of the Bank. As the ALJ found: "rather than preserve the Bank's few remaining assets, Landry chose to dissipate them in furtherance of his personal takeover of the Bank." R.D. at 60. This was both an unsafe or unsound practice and a breach of his fiduciary duties. *Hoffman*, 912 F.2d at 1174.

Respondent Landry felt no obligation to disclose to the Bank's board of directors any of his activities on his own/Pangaea's behalf or those of Jenson, Crabtree and Respondent Lewis. He faithfully attended every meeting of the board and the executive committee. He gave

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-$44,000 was extended to William White Bolles after the Bank had received a letter from Bolles indicating that he was subject to a $26 million RICO judgement.

-$450,000 was extended, with Landry's assistance, to GABL Corporation, whose principal, George Russell, had a longstanding bad credit history with the Bank. Another GABL principal, Byford Beasley, traveled to Ecuador with Pangaea principals, including Landry, to seek funding for Pangaea-related deals.

monthly financial reports to the board, but he failed to disclose that Bank funds were being spent in furtherance of Pangaea and IAIS. He failed to disclose the contracts and certain uncreditworthy loans to which he or Jenson had committed the Bank, or the fee-splitting arrangements, which benefited him and Pangaea to the Bank's detriment. At no time did he disclose to the board his role in the IAIS partnership.

Lewis' imprudence in carrying out his roles as the Bank's attorney and director and his inattention to his duties as a director were both a breach of his fiduciary duty and an unsafe and unsound practice – conduct contrary to prudent action which, if continued, exposed the Bank to abnormal risk of loss. He cannot escape his fiduciary responsibilities by ignoring them or abdicating them. *In the Matter of Patrick G. Huycke*, FDIC-91-86jj, FDIC Enf. Dec. Bound Vol. 2, ¶ 5168A, A-1807 (1991). In that case the Board stated that it

> [i]s not willing to burden the Bank and the public with the additional risk of a director who does not exercise careful, independent judgment in carrying out his fiduciary obligations and who is, at best, cavalier about the institution's federal and state regulatory obligations.

Id. at 1808.

As the United States Supreme Court clearly admonished in *Briggs v. Spaulding:*

> [W]e hold that the directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figureheads. They are entitled under the law to commit the

> banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of responsible supervision, nor are they to be permitted to be shielded from liability because of want of knowledge or wrongdoing, if that ignorance is the result of gross inattention. . . .

141 U.S. at 166.

As early as August 15, 1991, Respondent Lewis became aware of the Pangaea Plan and should have understood its impact on the Bank. The mere fact that three senior Bank insiders were incorporating an entity and going into business together with the intent to take over the Bank gave rise to Lewis' as a director to be alert and to further investigate any potential conflicts with the Bank to which he owed fiduciary duties. Lewis began reserving the corporate name, "Pangaea," for a bank holding company although he knew that formation of a holding company had not been approved by the board of directors. As one of the two individuals required to approve each expense voucher, Lewis certainly knew that the amounts being expended were greatly in excess of the $25,000 expenditure cap approved by the board with the Pangaea Plan. He authorized payment of travel vouchers in connection with various transactions either without knowing why the Bank was paying these expenses, or in disregard of the reasons for the payment; in either case, he violated his fiduciary duties.

With the October 1991, arrangement to create the IAIS partnership between his own law firm and Landry, Jenson and Crabtree, and the plan to have IAIS use the Bank's dormant Trust Department for personal gain,

Lewis joined in a series of breaches of fiduciary duty. He did not disclose the potential conflicts of interest inherent in having two-thirds of the Bank board's trust committee, Lewis and Jenson, and the Bank's "trustee," Landry, enter into a partnership designed to profit from the services of the Trust Department. R.D. at 74.[25]

As this Board explained in *In the Matter of Lowe and Spivey*, 2 FDIC Enf. Dec. ¶ 5153 at A-1536 (April 16, 1990), *aff'd*, 958 F.2d 1526 (11th Cir. 1992):

> In the Board's view, the fiduciary duty of loyalty which bank directors owe their institution requires a bank director to investigate the possibility of a conflict of interest and be completely candid with his colleagues. When a bank director finds himself in a situation involving a conflict of interest, as here, it is incumbent on him to make complete disclosure in order to affirmatively avoid a conflict, even if such disclosure seems superfluous.

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[25] Lewis argues in his Exceptions that there can be no wrong-doing in connection with IAIS because no partnership agreement was ever signed. He misses the point. First, as a matter of law, Louisiana does not require a written agreement to establish a partnership. La. Civ. Code Ann., art 2801-1848 (West 1997). Thus, it is significant that the agreement among the partners to act in furtherance of IAIS is clear on the record. The partnership name was reserved for almost a year by Respondent Lewis. Lewis, members of his law firm and Jenson met concerning the partnership from October 1991 through March 1992. Draft articles of incorporation were drawn up, legal research was performed and no bills for these legal services were tendered pursuant to the partnership arrangement. Tr. at 10007-8, 1043-61.

As the ALJ observed: "[I]t is difficult to imagine an arrangement more fraught with conflict, or for that matter with such a little chance of success where, as Lewis was well aware, the FDIC had already recommended termination of the Bank's deposit insurance and IAIS was supposed to be engaged in raising immediate money for capital infusion. . . . " R.D. at 75, fn 11.[26]

B. Effects of the Misconduct

Both Respondents sought personal benefit from their relationship with the Bank, either through Pangaea or the IAIS partnership. Each benefited by his ability to maintain his position at the Bank while focusing on these personal goals.

Respondent Landry's goal throughout the August 1991-September 1992 period was to have the Bank finance his acquisition of control of the Bank through Pangaea. In furtherance of this goal, he engaged in the numerous activities detailed in the Recommended Decision and highlighted herein. The Bank paid expenses directly attributable to Respondent Landry's improper activities totaling $278,000. Loan write-offs related to this series of misadventures were $174,900. Landry Ex. 160 Exhibit B.

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[26] The ALJ also finds that Landry failed to disclose for five consecutive quarters material information in quarterly Form F-4 reports filed by the Bank with the FDIC, in violation of 12 C.F.R. 335. R.D. at 47-54. Lewis' failures to disclose related to these quarterly reports were found by the ALJ to be evidence of Lewis' participation in unsafe and unsound practices and breaches of fiduciary duty. R.D. at 48. The Board concurs in both of these findings.

While Respondent Landry was focusing on obtaining control of the Bank, he continued to receive his salary and benefits from the Bank.

The financial gain to Respondent Lewis derived from the fact that, through his overt participation or passive acquiescence in this series of schemes, he was able to maintain a close relationship with his law firm's biggest client and its senior management, Respondent Landry, Jenson and Crabtree, and receive direct legal fees as a result of this relationship. The firm was paid by the Bank for its incorporation of Pangaea, Inc. and for the reservation of the corporate names "Amer Invest" and "Inter American Investment Services." Although Respondent Lewis claims that the billings were inadvertent clerical errors, the firm did not reimburse the funds to the Bank until May 1994, and it never reimbursed the full amount. Tr. at 1276-1277; FDIC Ex. 133, FDIC Ex. 133a, pg.2-3.

In addition to financial gain, Bank losses are also attributable to the Respondents. The Bank incurred more than $400,000 in expenses and loan losses paying for the advice, services, travel, contracts, loans and other arrangements set in motion by or acquiesced in by Respondent Landry. Tr. at 187-189, 264-268, 309-311; Landry Ex. 160. The Bank incurred legal fees and ultimately paid $70,000 to Place Vendome's receiver in bankruptcy because of Respondent Landry's unsafe and unsound banking practices in connection with that entity. Respondent Lewis approved expenditures which he either knew were not for the benefit of the Bank, or for which he failed to inquire or verify as for the benefit of the Bank.

Respondent Lewis' abdication of his fiduciary responsibilities enabled Respondent Landry, Jenson and Crabtree to proceed with impunity to hire and pay consultants, incur fees and expenses in furtherance of their personal goals without fear of being questioned or confronted. During the time these activities occurred, the Bank's capital level remained precariously low, earnings were deficit, and requirements of the Capital Directive were not fulfilled. Given that the Bank had no capital margin, the situation presented the possibility of serious prejudice to the Bank's depositors.

Had Respondent Lewis simply discussed his own activities on behalf of Pangaea and IAIS with the Bank's board of directors, there would have been an opportunity for the Bank to avoid the unsafe and unsound contracts, fee-splitting arrangements, trips and loans all linked to Pangaea and IAIS, all of which further depleted the Bank's capital base. Accordingly, the failures to disclose – by both Lewis and Landry – resulted in loss to the Bank.

C. Culpability

The ALJ found, and the Board concurs, that both Respondents engaged in conduct which involved personal dishonesty or willful and continuing disregard for the safety or soundness of the Bank.[27]

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[27] Section (e)(1)(C) of the FDI Act requires only a showing of *either* personal dishonesty *or* willful or continuing disregard for the safety or soundness of the Bank. 12 U.S.C. § 1818(e)(1)(C).

While the FDI Act does not provide a definition of acts or practices which are *per se* personally dishonest, case law has developed guidance. The Board of Governors of the Federal Reserve has held, and the U. S. Court of Appeals for the Eighth Circuit agreed, that in the context of a section 8(e) proceeding:

> [W]hile personal dishonesty (which is not defined in the statute) must be evaluated on a case-by-case basis it need not amount to civil fraud and could encompass a broad range of conduct. According to the board, this conduct may include: a disposition to lie, cheat[,] defraud; untrustworthiness; lack of integrity[;] . . . misrepresentation of facts and deliberate deception by pretense and stealth[;] . . . [or] want of fairness and [straightforwardness].

Van Dyke, 876 F.2d at 1379. *See In the Matter of Billy Proffitt*, FDIC-96-105e (October 6, 1998) (failure to disclose conflicting interest constitutes personal dishonesty or willful disregard of the bank's safety and soundness).

In *Greenberg v. Board of Governors of the Fed. Reserve Sys.*, 968 F.2d 164 (2d Cir. 1992), the court of appeals examined the Greenbergs' contention that their failure to fully disclose insider transactions did not constitute personal dishonesty within the meaning of section 8(e) of the FDI Act. The court stated:

> The Greenbergs also assert that the record does not support the Board's determination of personal dishonesty. More than substantial evidence exists to support the conclusion to the contrary. The Board found that the Greenbergs had not revealed several of the insider transactions to the directors of the bank. The record

> provides ample support for this conclusion. Minutes of the directors meetings are silent on the relationship between the Greenbergs and the limited partnership that received loans. *Cum tacet, clamant.* (With apologies to Cicero, literally "with silence they shout.") The Board and the ALJ were well within their discretion in rejecting the Greenbergs' self serving testimony to the contrary.

Greenberg, 968 F.2d at 171.

With these cases as guidance, it is clear that Respondent Landry was personally dishonest. As the ALJ states, "Landry has repeatedly admitted his personally dishonest acts in depositions, in his letter of resignation, and in his epic Landry Letter to Examiner-in-Charge Cooper." R.D. at 86; FDIC Ex. 121, 181(a), 181(c), 119, 120.[28]

Respondent Landry participated in and failed to disclose a series of actions, which clearly involved the misuse of Bank funds. Landry concealed the contract with Dakin & Willison from the board of directors, as well as its true purpose of facilitating the IAIS partnership with Lewis and his law firm. He also knew that Jenson had

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[28] In a deposition taken May 12, 1995, Respondent Landry stated as follows in response to the question "why did you resign ": "Because there was – I felt that there was a huge conflict between what Pangaea originally started to do, which was raise capital for First Guaranty Bank, and what it had become, which was a vehicle for Rick Jenson, Scott Crabtree, and at the time myself to make money off the bank. Basically . . . instead of going out and finding sources of capital for the bank, it had become an issue where we were finding sources of capital where they would give us the money, so we could go put money into the bank."

signed a contract with FPS, requiring the Bank to pay FPS to draft documents for a preferred stock offering which he knew was intended for a Pangaea – not a Bank – stock offering. After Pangaea's incorporation in February 1992, Landry signed agreements on behalf of Pangaea and permitted the use of Bank funds for Pangaea-related enterprises, including contracts with William White Bolles and Richard Crabtree and the trip to Ecuador. Landry also played a major role in the extension of credit to Robert F. Smith without disclosing that, through Pangaea, he would be splitting fees generated by the credit's extension. The ALJ found that "Landry's actions from August 1991 through September 16, 1992 provide an encyclopedia of personally dishonest acts." R.D. at 87.

Furthermore, it is significant, as found by the ALJ, that "at the board of directors meeting on November 14, 1991, at which the use of the Bank's trust department was discussed, there is an inculpating silence." R.D. at 88. *See Greenberg*, 968 F.2d at 171. Although Respondent Lewis asserts that he made "disclosure" to the board on November 14, his so-called "disclosure" was insufficient, and the Board concurs in the ALJ's finding that his failure to properly disclose his role in IAIS is evidence of personal dishonesty. Neither Respondent made a meaningful or comprehensible disclosure about the IAIS partnership, its members, or the potential conflicts between their duties to the Bank and representation of clients with funds in the Bank's trust department.[29]

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[29] The minutes' lack of specificity as to whatever disclosures were made is mirrored by the board members and recording secretary's inability to describe what role the CLMC

The "effects" element of the charge may also be established by a showing that Respondents acted with willful or continuing disregard for the safety or soundness of the Bank. *Brickner v. Federal Deposit Insurance Corporation*, 747 F.2d 1198 (8th Cir. 1984). The record fully supports the conclusion that Respondents so acted. Throughout the relevant time period, Lewis' clear intention was to maintain "deniability." In spite of Lewis' many important roles with the Bank, he asserts limited knowledge in order to deny the depth of his involvement with IAIS and Pangaea. However, "evidencing a willingness to turn a blind eye to interests in the face of known risk" constitutes willful disregard within the meaning of section 8(e) of the FDI Act. *Cavallari v. Board of Governors of the Fed. Reserve Sys.*, 57 F.3d at 144; *Hutensky v. FDIC*, 82 F.3d 1234 (2d Cir. 1996). Although Lewis was present at the meeting with the FDIC, heard the comments that the CEP was speculative and would not work, and knew of the impending termination of the Bank's deposit insurance, he continued to approve expenditures without inquiry and went along with the wrongful plans in willful disregard of the Bank's safety and soundness. The ALJ correctly found that Lewis intended the results of his action and inaction; his inaction was knowing and intentional and continued throughout the August 1991-September 1992 period. R.D. at 93.

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firm would play. No one had an accurate understanding of the proposed business venture or the relationship of the partnership and the Bank. Tr. at 725, 1725-26, 1728-29, 1749, 1778.

Landry's self-dealing to seize control of the Bank and to deceive the board of directors in furtherance of that plan was deliberate and intentional. As detailed in his September 16, 1992, resignation letter to the Bank, Landry clearly knew what he was doing on behalf of Pangaea, and he was aware of his breaches of fiduciary duty and intended to breach his fiduciary duty. Such actions constitute willful and continuing disregard for the safety and soundness of the Bank and satisfy the effects prong of section 8(e).

EXCEPTIONS

Together, the Respondents have filed some 110 pages of Exceptions challenging every legal conclusion, many evidentiary rulings and virtually every factual finding made by the ALJ. Discussed below are the major objections raised by Respondents throughout the proceeding and repeated as Exceptions to the Recommended Decision. The Board concludes that the Exceptions are generally without merit, repetitious and merely argue matters, which were adequately addressed by the ALJ. Those Exceptions not specifically discussed have been considered and are also denied.

A. Lewis' Exceptions

Respondent Lewis' Exceptions detail at length facts of which he asserts he was ignorant. For example, he states, "there is no evidence in the record whatsoever to establish that Alton B. Lewis had any knowledge whatsoever of the self-serving actions by Landry, Jenson and

Crabtree. As a matter of fact, the record contains extensive testimony indicating that Alton B. Lewis had no knowledge whatsoever of the self-serving actions." Lewis Except. at 4. As discussed above, Lewis' professed ignorance is no defense. Either Lewis knew about the misdeeds of senior management or he did not. If he did, his liability is clear for the expenses they incurred which were paid by the Bank with his approval, and for his failure to disclose material facts to the board. If he did not, his failure to inquire about facially suspicious and irregular situations of which he was aware, and his abdication of fiduciary responsibilities at a time he knew the Bank had no capital, also create liability.

Respondent Lewis repeatedly denies that he was aware of the incorporation of Pangaea. Lewis, Memorandum in Support of Exceptions to Decision ("Memo in Support") at 3. The evidence shows that, if he did not know of the incorporation on the date his partner, Andre Coudrain, prepared the Articles of Incorporation, he learned of this fact soon thereafter. Although Respondent Lewis had been reserving the Pangaea corporate name since August 1991, his letter and check dated February 26, 1992, reserving the Pangaea corporate name, were never processed by the Louisiana Secretary of State. FDIC Ex. 300; Lewis Ex. 41. After that date, Respondent Lewis made no further efforts to reserve the Pangaea name, while he continued to reserve the Inter American and Amer Invest names. Tr. at 1255-56; Lewis Ex. 44. If Lewis truly had not known of Pangaea's incorporation, it is fair to infer that he would have needed to continue reserving the Pangaea name beyond February 26, 1992. In addition, Coudrain sent Respondent Lewis a note, less than a

month after Pangaea was incorporated, asking for Respondent Lewis' input on a question about the entity. Lewis Ex. 45. If Respondent Lewis were truly unaware of the incorporation, the request would not have been made.[30]

Lewis asserts that the Recommended Decision is based on findings that "were simply presumptions" or "leaps of faith." Memo in Support at 1. Although he claims the examples "are legion," the Board will discuss one example to dispel his theory. Lewis challenges "a presumption that Alton B. Lewis knew the expenditures were for a purpose other than the benefit of [the Bank] when there is no proof whatsoever." *Id.* at 2. In the absence of a statement from Lewis that he knew the expenditures were not for the Bank's benefit, evidence to the contrary is of necessity circumstantial. This is not a "leap of faith," but a reasonable inference from the undisputed facts. Given Lewis' knowledge of the Pangaea, IAIS, and Trust Department activities, it is reasonable to conclude that he knew expenditures related to these activities were not for the Bank's benefit. As stated above, at the very least he had an obligation, which he failed to meet, to inquire as to the purpose of the expenditures.

In sum, the Board concludes that the gravamen of Lewis' defense – that he had no idea of what was going on – is simply disingenuous. The number of significant positions he held in the Bank bespeak a recognition of his talents, and how much he must have known, or should

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[30] Lewis claims that he didn't see the note until years later. It is clear, however, that Coudrain sent the note, and Lewis' knowledge was a reasonable inference from this fact.

have known. Frankly, the Board has great difficulty imagining him as the naif portrayed in his Exceptions. Upon a review of the entirety of Lewis' testimony, the Board finds no reason to disagree with the ALJ's apparent conclusion that his testimony is not credible.

Respondent Lewis describes himself as the Bank's "white knight," claiming that he and "Mr. Hood are the directors who basically stopped the attempt by Jenson, Crabtree and Landry to take over [the Bank] with no investment on their part." Memo in Support at 6. There is another, more plausible, view of Lewis' role based on this record and the economic self-interest of Lewis and his law firm arising out of their ownership of Bank stock. Lewis knew of the takeover attempt as early as his August 15, 1991 meeting with Jenson. He did nothing to impede its progress for over a year. To the contrary, he actively assisted the Pangaea activities. It appears that his efforts to "save" the Bank arose only after it was clear to him, as chairman of the special committee to evaluate offers for the Bank pending before the board of directors in September 1992, that, in order to preserve his own interest in the Bank stock he and his law firm held, Tr. at 1377, existing management had to be ousted and the Reynolds bid accepted.

1) Admissibility of Landry Letter

Respondent Lewis asserts that the Landry Letter is not admissible as to him because it is "simply hearsay." Landry Exceptions at 6. The FDIC's Rules, which govern the administrative hearings held in enforcement proceedings, specifically permit the use of hearsay evidence if it

is relevant, material, reliable and not unduly repetitive. 12 C.F.R. § 308.36(a)(3). Moreover, Respondent Lewis had every opportunity to present evidence contrary to the assertions of the Landry Letter.

The Landry Letter is credible for several reasons:

- If Respondent Landry lied, he risked subjecting himself to criminal sanction for making false statements to the FDIC under 18 U.S.C. § 1001;

- The letter was written in June 1993, some four years closer to the events than the hearing;

- Respondent Landry testified that he discussed all the events and transactions with Examiner-in-Charge Cooper at the time he wrote the letter, in 1993. Tr. at 1794.

The ALJ found, and the Board agrees, that the Landry Letter was more credible than Respondent Lewis.

2) Inter American Investment Services Partnership

Respondent Lewis argues that, because the IAIS partnership was never formalized by a written document, it is not an important issue in this case. Lewis Except. at No. 21. The formality of the partnership is irrelevant to the proceedings. Under Louisiana law, no written agreement is needed to form a partnership, La Civ. Code Ann., art. 2801 (West 1997). Even without a written agreement or a federal tax ID number, the evidence clearly supports a finding that Lewis, his law firm, Jenson, Crabtree and Respondent Landry conducted themselves as if there were an IRIS partnership and acted in furtherance of that partnership, primarily funded at the Bank's expense. Respondent Lewis knew what he was doing when he

approved reimbursement of the immigration fund-related expenditures for his partners, and, even if he did not, he had the duty to find out what the expenditures were for, which he failed to do. The Exception is denied.

3) Motion to Sever

Respondent Lewis filed a Motion to Sever setting forth two bases: first, that because the Notice contains so few references to Lewis, it would "result in tremendous unnecessary and unjust expense" to Lewis to be required to participate in a proceeding involving numerous other parties and allegations that do not appear from the Notice to apply to Lewis; and second, that Lewis would be prejudiced by his possession of exculpatory information that is subject to privileges held by the Bank. The Motion to Sever was opposed by FDIC Enforcement Counsel, Respondent Landry as well as Jenson and Crabtree.

The ALJ denied Lewis' Motion to Sever, finding that he offered no compelling reason for severance that would overcome requiring the government to duplicate its effort in presenting two cases on the same matter with the same witnesses and exhibits. 12 C.F.R. § 308.22(b). The Board concurs and denies Respondent's Exception.[31]

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[31] Lewis' claim of privilege is irrelevant to the issue of severance. His responsibility to protect the attorney-client privilege is the same whether or not his proceeding is severed.

4) Bias of FDIC Attorney

Respondents alleged personal animosity or bias by FDIC attorney, Michael R. Tregle, against Respondent Lewis as the basis for the institution of these proceedings.[32] FDIC Enforcement Counsel filed a Motion in Limine seeking an order excluding all evidence or legal argument related to these allegations. Opposition replies to the Motion in Limine were filed by Respondents. On July 21, 1997, the ALJ issued an Order Granting the Motion in Limine. Respondents reiterate their position in their Exceptions.

Prior to his service with the FDIC, Mr. Tregle was in private law practice in Hammond, Louisiana. Respondent Lewis had filed a legal malpractice action against Mr. Tregle. Later, the Bank, through Respondent Lewis, filed an action against Mr. Tregle for indebtedness owed by Mr. Tregle to the Bank, obtaining a judgement [sic] against Mr. Tregle in the amount of $114,000 plus attorney's fees, interest, and costs. Subsequently, Mr. Tregle filed bankruptcy. Landry's Memorandum in Opposition to FDIC's Motion in Limine at 1-2.

The record does not indicate why Mr. Tregle was selected by FDIC enforcement staff to work on this matter. Nonetheless, the Board agrees with the ALJ that his participation, allegedly reflecting improper motivation consisting of bias, personal animosity, desire for vengeance, or other iniquity, is not relevant or material to the issues of this case. Order Granting Motion in Limine at 3.

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[32] Respondent Landry joined Lewis in this challenge.

Other than Respondent Lewis' unsupported statement that "these entire proceedings are tainted and suspect" as a result of "personal animosity or a desire for vengeance," Opposition on Behalf of Alton B. Lewis to FDIC's Motion in Limine at 1, the record contains no evidence from which a finding in favor of Respondents could be made.[33] There is no allegation that the Notice in this case was not properly issued pursuant to statutory authority granted the FDIC Board and delegated to the Director of the FDIC's Division of Supervision by section 303.9(d) of the FDIC Rules, 12 C.F.R. § 303.9(d). Duplicating their memoranda of law, each Respondent points to alleged erroneous assertions in the Notice which are intended to support the claim that the Notice was borne of bias or animosity. First, each of the items raised amount to no more than insignificant factual discrepancies in the context of this case. Second, the FDIC Rules call for notice pleading and permit liberal amendment. 12 C.F. R [sic] §§ 308.18, 308.20. If any of the "errors" in the Notice were significant, they could have been modified by amendment. Third, it is the obligation of the ALJ to disregard any irrelevant evidence, to consider the sufficiency of the evidence presented at trial, and to base his recommendation on the facts presented at the hearing, all of which he has done.

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[33] Mr. Tregle was the fourth most senior attorney, of a five-person legal team, assigned to this case. The allegations of impropriety were referred by the FDIC Regional Counsel to both the FDIC's Ethics Office and the Ethics Advisory Service of the Louisiana State Bar Association and were cleared by both offices. Nevertheless, the Board notes that it is preferable to avoid creating even an appearance of a conflict.

Only the specific acts of the Respondents alleged in the Notice are relevant and material to this proceeding. Even if proven, which they are not, the allegations concerning Tregle would not rebut the charges against Respondents nor absolve them of liability. As stated by the ALJ, "[i]f the charges of the Notice are proven true and sufficient all the prosecutorial ill-will in the world by Enforcement Counsel would not constitute a valid defense." Order Granting Motion in Limine at 3. Respondents' Exception is denied.

B. Landry's Exceptions

Respondent Landry filed Exceptions as well with respect to virtually every finding of fact and conclusion of law made by the ALJ.[34] The Board has adopted the

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[34] A further indication of the type of Exceptions filed by Landry are the numerous completely frivolous Exceptions. For example, he claims that "the FDIC lacks jurisdiction of the securities law charge," that "the FDIC lacks jurisdiction of transactions of Pangaea not involving the Bank," and that the FDIC "lacks jurisdiction of any allegations that Landry violated an injunction of an Article III court." Landry Except. at 48-50. There were allegations of securities fraud in the Notice, but as Landry concedes, "the securities fraud allegations were dropped at trial." Landry Except. at 48. Nonetheless, he argues that the FDIC does not have jurisdiction over allegations of violations of its own disclosure regulations, which implement provisions of the Securities Exchange Act, "because section 27 of the Securities Exchange Act provides that the jurisdiction of the federal courts is exclusive with respect to violation of the Securities Exchange Act of 1934 and regulations thereunder." *Id.* at 49. The FDIC's jurisdiction in this administrative proceeding is clear, and the Exception is denied. No charges related to these two other assertions were at issue in this case, and these Exceptions are also denied.

ALJ's findings of fact and conclusions of law because they are supported by the preponderance of the evidence. Essentially, Landry's position throughout this proceeding and reiterated in his Exceptions is that, while all of the transactions described in his letter and throughout the hearing took place, he is not responsible for any of them, and their consequences cannot be attributed to him. Landry Except. at 76-91. This position does not comport with the evidence. The record clearly establishes Landry's responsibility for the inaccurate regulatory filings, breaches of fiduciary duty, unsafe and unsound practices and related Bank losses. Landry participated in the initiation, creation and implementation of plans and the expenditure of Bank funds to attempt to create a bank holding company for the sole benefit of himself, Jenson and Crabtree.

Throughout the period August 1991 to September 1992, no meaningful disclosure was made to the Bank's board of directors of the Pangaea Plan, Pangaea's incorporation, or the agreement among Landry, Jenson, Crabtree and the Bank's law firm to form IAIS and Amer Invest, Inc. Landry was a Bank officer and an institution-affiliated party who functioned as a member of the Bank's inner management group, attending all board meetings. Although Landry was not a loan officer, he participated in and facilitated the Bank's extensions of credit to poor-quality borrowers involved with Pangaea or IAIS and those who had consulting contracts with the Bank or fee-splitting arrangements with Pangaea. Landry argues that these extensions of credit were eventually made under the personal lending authority of Jenson, a fact he says absolves him of liability. Landry Except. at

30-33. Landry's knowledge of the nature of these transactions, coupled with knowledge that Bank loan officers had objected to the loans, should have been enough to have made Landry raise questions with the board of directors. He can not absolve himself of his duties to the Bank simply because Jenson signed many of the documents at issue. Landry's Exceptions are denied.

1) Challenges to ALJ's Authority

Respondent Landry begins his attack on the FDIC's charges against him by challenging, once again, the ALJ's authority to preside in this case.[35] On the one hand, Respondent Landry charges that the ALJ lacked authority to preside over this enforcement proceeding because the ALJ's appointment, under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 (1989) ("FIRREA") violated the

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[35] In his Exceptions, Respondent Landry essentially reargued his Motion To Disqualify The ALJ, Or, In The Alternative, To Dismiss For Lack Of Jurisdiction ("Motion to Disqualify") which he filed on September 11, 1997. On September 22, 1997, the ALJ had entered an Order granting Enforcement Counsel's request that it be allowed to respond to the Landry Motion to Dismiss at the time its post-hearing brief was due to be filed. On January 13, 1998, Enforcement Counsel filed a response to Landry's Motion to Disqualify. Thereafter, in response to requests for clarification from both Landry and Enforcement Counsel, the ALJ ordered that "Respondents may in their respective post-hearing briefs properly discuss any arguments raised by Enforcement Counsel in their Response to the Motion, and that Enforcement Counsel shall have the last word in their post-hearing reply to discuss any arguments properly raised by Respondents in their post-hearing briefs."

Appointments Clause of the U.S. Constitution. art. II, § 2, cl. 2. But before reaching this core argument, Landry also argued that the procedure used to appoint Judge Alprin to hear this matter violated the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* ("APA"). For the reasons discussed below, the Board finds that both of Landry's challenges to the ALJ's authority are without merit.

Turning first to his constitutional challenge, Landry contends that both Judge Alprin's initial hiring by the Office of Thrift Supervision ("OTS") and his subsequent assignment by the Office of Financial Institution Adjudication ("OFIA")[36] to preside in this case violated the Appointments Clause of the U.S. Constitution, art. II, § 2, cl. 2. Landry asserts that, under the Appointments Clause, Congress may assign the appointment of "inferior

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[36] Until the enactment of FIRREA, none of the banking agencies employed their own Administrative Law Judges ("ALF"). Instead, when one of those agencies brought an administrative enforcement action, it had to borrow an ALJ employed by some nonbanking agency. With FIRREA section 916, however, Congress required the banking agencies to "jointly establish their own pool of administrative law judges." 103 Stat. 486, 12 U.S.C. § 1818 note. Pursuant to the mandate of section 916, the banking agencies entered into an Administrative Law Judge Agreement ("Agreement") to share ALJs. Pursuant to the Agreement, OFIA was created and, in August 1991, the OTS appointed two ALJs who are shared with the other banking agencies. While the OTS appointed both ALJs, its choice of appointees was made at the conclusion of a process in which all the banking agencies participated and concurred in the selections. The ALJs are paid by and receive their benefits from OTS. The banking agencies agree on the annual budget for OFIA and share the costs, reimbursing OTS for their respective shares of the expenses incurred.

officers" such as administrative law judges to the President, the courts of law, or the heads of Departments, but that Congress has no constitutional authority to assign the power elsewhere. Therefore, Landry argues, the OTS's hiring of Judge Alprin and OFIA's assignment of him to this matter were unconstitutional.

The Board disagrees with Landry's constitutional analysis, resting as it does on the assertion that the OTS, the FDIC and OFIA are constitutionally disabled from appointing any employees who might be regarded as "inferior officers." Congress has, in many instances and for many years, vested in non-Cabinet agencies the authority to appoint inferior officers.[37] In this manner, under FIRREA section 916, Congress directed the federal banking agencies to hire ALJs. Thereafter, the FDIC, the Office of the Comptroller of the Currency, the Federal Reserve Board, OTS and the National Credit Union Administration agreed to share ALJs who, as an administrative matter, would be hired by OTS. *See supra* text accompanying footnote 35.

Thus, pursuant to FIRREA, Congress, within its discretion, directed that the federal banking agencies establish a pool of ALJs to preside in administrative

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[37] *See, e.g.*, 12 U.S.C. § 1819(a) Fifth (FDIC – corporate powers "to appoint by its Board of directors such officers and employees as are not otherwise provided for in this chapter"), 47 U.S.C. § 155(f) (FCC – managing director); 15 U.S.C. § 78(b) (SEC – "such officers as may be necessary"); 7 U.S.C. § 4a(c) (CFTC – general counsel). *See also, Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991) (*see particularly*, 501 U.S. at 918, Scalia, J., concurring).

enforcement proceedings. To that end, the agencies established OFIA to oversee the work of the ALJ thus employed by OTS, and through which the banking agencies have the use of a "pool" of ALJs. Accordingly, the ALJ in this case was validly appointed within the meaning of the Appointments Clause.

In the instant case, after the FDIC filed its Notice against the Respondents, Judge Alprin was assigned to hear this matter under Rule 103 of the FDIC's Rules, 12 C.F.R. § 308.103, as required by section 916 of FIRREA. According to Landry, however, the FDIC's compliance with section 916 of FIRREA raises a conflict with section 3105 of the APA, 5 U.S.C. § 3105, which provides in part that "each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title." Under Landry's interpretation of section 3105, the FDIC is the only "agency" that can appoint the presiding ALJ in an FDIC administrative proceeding. Landry does allow that, if the FDIC did not have enough ALJs available, it could have requested the U.S. Office of Personnel Management to appoint an ALJ in this case under section 3344 of the APA, 5 U.S.C. § 3344, but, since this was not the actual mechanism used to secure ALJ Alprin's appointment as presiding officer, Landry argues, OFIA's appointment of the ALJ violates the APA.

Contrary to Landry's contention, the appointment of the two ALJs that work within OFIA is not violative of section 3105 or any other statute. The OTS is an agency under 12 U.S.C. § 1462a, and its authority was used to

hire both ALJs.[38] Even if section 916's requirement that the banking agencies jointly form a pool of ALJs may be deemed somehow to depart from section 3105, the law is clear that such a departure is permissible. *See Ramspeck v. Trial Examiners Conf.*, 345 U.S. 128, 133 (1953) ("The position of hearing examiners is not a constitutionally protected position. It is a creature of congressional enactment . . . Their positions may be regulated completely by Congress, or Congress may delegate the exercise of its regulatory power. . . . "). We reject Landry's hyper-technical assertion that section 3105 prohibits the practical, cooperative arrangement mandated by section 916 and established by the Agreement.

Congress can, and does, deviate from the requirements otherwise mandated in the APA. In *Schweiker v. McClure*, 456 U.S. 188 (1982), the Supreme Court upheld a procedure established by Congress and the Secretary of Health and Human Services, under which hearing examiners appointed by private insurance carriers presided over hearings to determine eligibility for benefits under a federal program administered by the carriers on behalf of the Secretary. *See also Marcello v. Bonds*, 349 U.S. 302 (1955); *Director, Office of Workmen's Compensation Program, U.S. Dept. of Labor v. Alabama By-Products Corp.*, 560 F. 2d 710 (5th Cir. 1977). Because Congress is free to depart from the specific requirements of the APA, to the extent that it may have done so, section 916, rather than any

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[38] *See Doolin Security Savings Bank v. Office of Thrift Supervision*, 139 F.3d 203, 204 (1998); *Edmond et al. v. United States*, 117 S.Ct. 1573 (1997).

provision of the APA, controls how the banking agencies obtain ALJs for their enforcement proceedings.[39]

Moreover, as Landry himself points out, under section 3344 of the APA, 5 U.S.C. § 3344, agencies are authorized to borrow ALJs from other agencies on a temporary basis as the need arises. Section 916 provides a clear expression of congressional intent that the federal banking agencies create their own pool of ALJs rather than borrowing them from other agencies on an ad-hoc basis. Thus, section 916 of FIRREA, implemented in the Agreement, is effectively nothing more than a variation of the APA's section 3344 sharing provision.

When it enacted FIRREA, Congress recognized that the banking agencies needed ALJs who had banking law expertise and that each agency may not have sufficient enforcement work to maintain its own staff of ALJs. Congress addressed this problem by providing the agencies a way to carry out the APA's purpose of promoting "administrative expertise" through the development of a "corps of expert hearing examiners" within the agencies,

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[39] This result is consistent with the familiar rules of statutory construction under which a conflict between two statutes is resolved by resort to the more recent or more specific of the two. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992) ("[I]t is a common-place of statutory construction that the specific governs the general. . . . "); *Cheffer v. Reno*, 55 F. 3d 1517, 1522 n. 10 (11th Cir. 1995) ("Normally, where there is a conflict between an earlier statute and a later enactment, the later statute governs.") In this case, although the FDIC does not in fact regard the provisions of sections 916 and 3105 to be in conflict, section 916 is both more recent and more specific.

see *Ramspeck v. Federal Trial Examiners Conf., rev'd* 345 U.S. 128 (1953), without sacrificing ALJ independence from the agencies. *See Butz v. Economou*, 438 U.S. 478, 513 (1978). That is precisely what the agencies have accomplished with the creation of OFIA, and their interpretation of section 916 as authorizing the manner in which OFIA was created is entitled to deference. *Chevron U.S.A. v. NRDC*, 467 U.S. 837, 842-845 (1984); *Morel v. INS*, 90 F. 3d 833, 844 (3rd Cir. 1996) ("[I]t scarcely need be stated that ordinarily the courts owe deference to an administrative interpretation of a statute.") Therefore, the agency actions in creating OFIA were authorized by Congress and should be sustained.

2) Other Exceptions

Respondent Landry filed 20 pages of Exceptions pointing to numerous alleged factual inaccuracies of the Recommended Decision and its failure to adopt his proposed findings of fact. Landry Except. at 17-37. None of the alleged factual inaccuracies is material to the case. Landry claims, for example, that the "so-called 'fee-splitting agreement' with Funding Placement Services" is actually a "memorandum of understanding between FPS and Pangaea, not the Bank." Landry Except. at 28. He then states that the FDIC admits that Jenson, not Landry, caused the Bank to pay FPS $15,000 for the introduction of Blue Rose to Pangaea principals Jenson and Crabtree. *Id.* He conveniently omits that Landry was the third Pangaea principal and then asserts that there was "no finding that the contract with FPS benefited Landry." *Id.* When the Bank paid fees for the introduction of Blue

Rose to Pangaea, of which Landry was a principal, however, the benefit to Landry was clear.

In denying responsibility for loans made to uncreditworthy borrowers, Respondent Landry also denies that the Bank experienced loss on several of these loans, pointing out that they were repaid. Landry Except. at 29, 32. The Board has held, however, that the repayment of such loans is entitled to slight, if any, mitigating weight. *See FDIC v. Grubb*, 1 FDIC Enf. Dec. ¶ 5181 at A-2031, *aff'd*, 34 F. 3d 956 (10th Cir. 1994). As the Board has pointed out, it is the "risk associated with the initiation of loans such as [these]" that has led the Board to hold that such loan, when classified, result in loss to a bank. *See In the Matter of James L. Leuthe*, FDIC-95-15e and FDIC-95-16k, 1 FDIC Enf. Dec. ¶ 5249 at A-2915 (June 1998), *appeal docketed*, (D.C. Cir. July 29, 1998) (No. 98-1355).

Conclusion

In addition to the Findings of Fact, upon review of the entire record the Board adopts the ALJ's Conclusions of Law. The record amply supports finding that with respect to each Respondent the elements of an action pursuant to section 8(e) has been established by a preponderance of the evidence.

The Board reiterates its concerns, expressed in *In the Matter of Irwin Weitz*, FDIC-93-91e, at A-2857, that an attorney representing a financial institution, "like the institution's directors and officers, occupies a position of trust and has important fiduciary obligations to the financial institution," (citing *Stoller*). Such obligations go to the

very heart of the relationship between counsel and client and cannot be discarded by protestations of ignorance or denial. Although the court in *United States v. Cassiere* referred to a closing attorney as the "eyes and ears of the lending institution," it is no less true for an attorney, such as Respondent Lewis who has both a broad, long-term attorney-client relationship with the Bank and an intimate relationship with the Bank as one of its most influential, if not the most influential, director.

As described above, Respondent Landry's self-dealing presents an almost classic fact pattern for removal, and his removal and prohibition is overwhelmingly supported by this record.

An appropriate Order of Removal and Prohibition shall be entered.

ORDER OF REMOVAL AND PROHIBITION

For the reasons set forth above, and pursuant to section 8(e) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(e), it is hereby ORDERED that:

1. Michael D. Landry is hereby removed from First Guaranty Bank, Hammond, Louisiana.

2. Michael D. Landry and Alton B. Lewis shall not participate in any manner in the conduct of the affairs of any insured depository institution, agency or organization enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D);

3. Michael D. Landry and Alton B. Lewis shall not solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent or authorization with respect to any voting rights in any financial institution, agency, or organization enumerated in 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D);

4. Michael D. Landry and Alton B. Lewis shall not violate any voting agreement previously approved by an appropriate federal banking agency with respect to any insured depository institution, agency, or organization enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D);

5. Michael D. Landry and Alton B. Lewis shall not vote for a director, or serve or act as an institution-affiliated party, as that term is defined in section 3(u) of the FDI Act, 12 U.S.C. § 1813(u), of any insured depository institution, agency, or organization enumerated in section 8(e)(7)(A) of the FDI Act, 12 U.S.C. § 1818(e)(7)(A), without the prior written consent of the FDIC and the appropriate Federal financial institutions regulatory agency, as that term is defined in section 8(e)(7)(D) of the FDI Act, 12 U.S.C. § 1818(e)(7)(D).

This ORDER will become effective thirty (30) days from the date of its issuance. It will remain effective and in force except to the extent that, and until such time as,

any provision shall have been modified, terminated, suspended, or set aside by the FDIC.

By direction of the Board of Directors.

Dated at Washington, D.C., this 25th day of May, 1999.

/s/ Robert E. Feldman
Robert E. Feldman
Executive Secretary

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APPENDIX

Following review of the documents submitted for *in camera* inspection, the Board makes the following determinations:

On the basis of the Revised Privilege Log, the Board sustains the deliberative process privilege claim for documents # 1, 2, 3, 9, 10, 11, 12, 16, 20, 21, 23, 24, 28, 29, 37, 39, 43, 44, 45, 48, 49, 51, 52, 53, 54, 55, 56, 57, 61, 64, 80, 81, 82, 83, 87, 88, 89, 90, 91, 92, 94, 95, 96, and 97. These are documents that were sent by a subordinate to a superior and contain opinions and recommendations related to proposed supervisory activities or enforcement actions. As such, they are classic examples of documents covered by the deliberative process privilege.

Also sustained was the claim of attorney-client privilege and law enforcement privilege for certain of these documents. These are Reports of Apparent Crime ("Criminal Referrals") or related documents prepared either by the FDIC or the Bank.[1] The Criminal Referrals prepared by the FDIC and sent to the Department of Justice ("DOJ") are clearly covered by the attorney-client privilege. It is well recognized that the FDIC's attorney is the DOJ and its U.S. Attorneys with regard to investigations of bank misconduct and for the referral of suspected criminal violations for prosecution. The Criminal Referrals were disclosed in confidence to the DOJ. These are the types of documents protected by the attorney-client privilege. *Federal Deposit Insurance Corporation v. Cherry, Behaert & Holland*, 131 F.R.D. 596, (M.D. Fla. 1990), *FDIC v. Ernst & Whinney*, 137 F.R.D. 14 (E.D. Tenn. 1991).

Items numbered 28, 29, 44, and 54 are three Criminal Referrals prepared by, or on behalf of the Bank.[2] This Board has previously sustained the law enforcement privilege with respect to a Report of Apparent Crime prepared by a bank absent a showing of "extraordinary circumstances warranting disclosure of the [r]eport." *In*

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[1] A state nonmember bank, including First Guaranty Bank, is required to file a Criminal Referral (now "suspicious activity report") when it detects, among other things, a known or suspected criminal violation of federal law. 12 C.F.R. § 353.3.

[2] Document 44 is a draft of the Criminal Referral that is document 54. Documents 28 and 29 are Criminal Referrals prepared by the Bank which involve possible irregularities by a teller and a non-customer, respectively, neither of whom is named in the Notice. Respondent can make no justifiable claim to these documents.

the Matter of James E. Abbott et al., Decision and Order on Interlocutory Review, FDIC-94-167e, FDIC-95-187k, September 16, 1997. In the instant case, no such showing has been made, nor could it be made. This civil enforcement matter raises no charges of criminal activity against Respondent Landry, and there is no allegation that violations of a criminal statute underpin this case. The documents underlying the facts of this case have been produced to Respondent. Respondent was free to pursue discovery from the Bank and other sources of non-privileged information relevant to the FDIC's enforcement proceeding against him. He may not use the civil discovery process to obtain information about a potential criminal investigation in which he may be implicated. "[C]onsiderations of public policy should prevail in order to prevent the civil discovery rules being subverted into a device for improperly obtaining discovery in the criminal proceedings." *Kaiser v. Stewart*, 1997 WL 66186 at *4 (E.D. Pa.) (quoting *Campbell v. Eastland*, 307 F. 2d 478, 486 (5th Cir. 1962), cert. Denied, 371 U.S. 955 (1963)).

Finally, Criminal Referrals prepared by or on behalf of the Bank are also protected from disclosure by 31 U.S.C. § 5318(g). This section expressly prohibits a financial institution voluntarily reporting a suspicious transaction to federal law enforcement authorities, pursuant to applicable criminal referral reporting regulations, from notifying any person involved in the transaction that the transaction has been so reported. Accordingly, the Board

finds that 31 U.S.C. 5318(g) precludes the disclosure of these documents.[3]

Of the documents reviewed *in camera* by the Board, the deliberative process privilege is properly asserted with respect to documents 27, 30, 32, 33, 34, 35, 36, 41, 42, 50, 60, 72, 73, 84, and 93. In addition, documents 75, 85 and 86 contain deliberative material properly withheld. Protected are opinions, recommendations and advice of FDIC employees related to agency decision making. Specifically protected here are documents related to enforcement decisions and approval determinations under section 32 of the FDI Act. These are the very types of documents intended for the protection of the deliberative process privilege to promote the free exchange of opinion, recommendation and deliberations among government staff. With respect to the remainder of these three documents and the remaining 25 documents reviewed *in camera*, the Board finds the deliberative process privilege to be inapplicable because they do not contain the type of information for which the privilege may be asserted. These documents do not reflect recommendations, advice or opinion provided by an agency subordinate to a supervisor involved in the decision-making chain.

When viewed in the context of the issues in this case, however, it is clear that the failure to disclose these documents is harmless. The documents contain no new

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[3] A bank that receives a subpoena or other request for a criminal referral must notify the FDIC so that the FDIC may, if appropriate, intervene in litigation or seek the assistance of DOJ. 12 C.F.R. § 353.3(g).

probative evidence.[4] To a great extent, the information is irrelevant to the charges in the case (documents # 8, 26, 31, 47, 58, 68, 76, 78), irrelevant to Respondent Landry's defense (documents # 4, 5, 6) or it is already in evidence (document # 46). Many of the documents contain data showing the Bank's capital condition at various times and other financial data contained in the Bank's Reports of Examination or Call Reports (documents # 15, 22, 25, 59, 70). The factual portions of the Reports of Examination were disclosed under a protective order and the dismal financial condition of the Bank was the subject of a stipulation by the Respondents at the hearing. Several documents are file memoranda that memorialize meetings or conversations between the regulators and the Bank (documents # 38, 40, 62, 63, 65, 66, 67, 71, 79, and 75, 85, and 86, in part). They are purely factual recitations and therefore are not privileged. However, all the information in these documents is contained elsewhere in the record, making it duplicative and merely cumulative.

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[4] None of these documents contain exculpatory material as Respondent Landry has repeatedly claimed in his pleadings seeking access under *Brady v. Maryland*, 373 U.S. 83 (1963). Assuming, *arguendo*, Landry were [sic] entitled to *Brady* material in this proceeding, these documents would not be covered. The documents to which the privilege applies contain predecisional advice, recommendations or opinions, not exculpatory factual evidence. All other factual evidence contained in the contested documents has been disclosed.

APPENDIX C

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of MICHAEL D. LANDRY, and ALTON B. LEWIS, individually, and as institution-affiliated parties of FIRST GUARANTY BANK HAMMOND, LOUISIANA (INSURED STATE NONMEMBER BANK)	Docket No. FDIC-95-65e

DECISION RECOMMENDING ORDER OF PROHIBITION AGAINST RESPONDENTS LANDRY AND LEWIS

(Issued August 14, 1998)

APPEARANCES:

On behalf of Federal Deposit Insurance Corporation:

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on behalf of Alton B. Lewis:

Christopher M. Moody, Esq.
Hammond, Louisiana

BEFORE: Walter J. Alprin
Administrative Law Judge
Office of Financial Institution
Adjudication
Washington, D.C.

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I. INTRODUCTION AND PROCEDURAL HISTORY

On April 30, 1996, the Federal Deposit Insurance Corporation ("FDIC") issued a Notice of Intention To Remove From Office And to Prohibit From Further Participation involving five institution-affiliated parties of First Guaranty Bank of Hammond, Louisiana ("First Guaranty or Bank). The FDIC sought to prohibit Rick A. Jenson (Jenson), Scott P. Crabtree (Crabtree), Danna A. Doucet ("Doucet"), Michael D. Landry ("Landry"), and Alton B. Lewis ("Lewis"), pursuant to section 8(e) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(e). Three of these

individuals settled with the agency prior to hearing, leaving Landry and Lewis as the remain Respondents.[1]

A prehearing conference convened with the undersigned and the parties in New Orleans, Louisiana, on July 18, 1997, for the purposes of narrowing the issues. On September 12, 1997, Respondent Landry filed a Motion to Disqualify the undersigned, Or in the Alternative, Motion To Dismiss For Lack Of Jurisdiction, a dispositive motion, the ruling of which is later included in this Recommended Decision. On September 22, 1997, the undersigned granted agency's request to delay a response to the motion until the posthearing phase of this case. On October 6, 1997, a hearing commenced in New Orleans, Louisiana and concluded on October 20, 1997. Request for extension of time for filing briefs was granted. The Recommended Decision below is based upon a careful review of the complete record in this matter.

II. STATEMENT OF THE CASE

This case involves, for the relevant time period, an ailing institution badly in need of capital infusion and subject to a Capital Directive requiring it to infuse over $4,000,000 of additional capital. Enforcement Counsel in part charge

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[1] FDIC issued an Order of Prohibition against Doucet on May 9, 1997. On October 1, 1997, Enforcement Counsel advised the undersigned that Respondents Jenson and Crabtree signed stipulations and consents to the issuance of orders of Prohibition from Further Participation.

Respondent Landry, with Jenson and Crabtree, with participating in attempting to appropriate the Bank by creating the bank holding company which they would control, Pangaea Corporation ("Pangaea") under the guise of recapitalization efforts, and would control the Bank. Enforcement Counsel allege in part that Landry, Jenson and Crabtree dissipated the Bank's assets through costly employment contracts, poor loans to investors, and associated costs and travel expenses, all for their own personal benefit, and not for the benefit of the institution. Finally, Respondent Lewis is charged with participating in these acts, failing to advise the Bank's Board of Directors of Pangaea's activities and approving the associated cost and expense statements.

Landry, with Jenson and Crabtree are charged with engaging in a scheme to raise capital by non-banking financial enterprises carried out through Pangaea, which they would control, and an associated partnership, Inter American Investment Services ("Inter American"), an entity to consist of Landry, Jenson, Crabtree and Lewis' law firm. Pangaea was to be funded by investors contributing $16,000,000, in units of $1,000,000, to take advantage of a newly arranged immigration scheme. Senior management consisted of Jenson, Crabtree and Landry, controlling and owning 70 percent of Pangaea without investing their own capital. Inter American Investing, planned to aid in immigration scheme, was an equal partnership of Landry, Jenson and, Crabtree, and Lewis' law firm. The law firm's equal partnership interest was to contribute legal services. As a result of the expenditures made on Pangaea, for the benefit of Landry, Jenson and Crabtree, the Bank suffered loan-losses and wasteful

expenditures totalling over $450,000 at the very time when it needed most to conserve and add to what already insufficient assets and capital it had.

III. FINDINGS OF FACT

A. JURISDICTION

1.[2] At all relevant times, the First Guaranty Bank, of Hammond, Louisiana ("the Bank") was a corporation doing business under the laws of the state of Louisiana at Hammond, as a state-chartered financial institution not a member of the Federal Reserve System. Deposits held by the Bank on behalf of its customers and depositors are insured by the Federal Deposit Insurance Corporation pursuant to 12 U.S.C. §§ 1811 through 1831t. The Bank was at all pertinent times subject to the requirements of the Federal Deposit Insurance Act, its rules and Regulations, and the laws of the State of Louisiana. (Admitted.)

2. Landry was hired by the Bank in 1981, and served in a variety of positions, being vice-president, chief financial officer, and cashier by February of 1992. (Admitted. Landry, Tr. 1792.) He attended every meeting of the Bank's Board of Directors, and its executive committee. (Cefalu, Tr. 708; FDIC Exhs. 61, 63, 72, 73, 80, 82, 83, 85, 86, 87, 89.)

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[2] Abbreviations used without other explanation are:
Tr. Transcript page, preceded by name of witness.
Exh. Exhibit number, preceded by party offering.

3. Lewis was at all relevant times, and still is, a member of the law firm of Cashe, Lewis, Moody & Coudrain ("CLMC"), a general partnership organized under the laws of the State of Louisiana. (Lewis, Tr. 1224-1225.) Though primarily a litigation attorney, in 1985, Lewis began performing legal services for the Bank, and in 1988 was elected to the Board of Directors.[3] (Lewis, Tr. 1226-1229.) He remained a Director and Secretary.

B. OTHER INVOLVED INDIVIDUALS

4. Jenson was a Respondent who entered into a settlement agreement prior to commencement of the hearing. He was hired by the Bank in June of 1987, and named as president and chief executive officer on February 14, 1991, also serving as a member of Board of Directors. (Stipulated. FDIC Exh. 299, pg. B-4; FDIC Exh. 2, pg. B-1.) From February 14, 1991, through December 17, 1992, Jenson served on the trust, loan, audit and examination, and executive committees of the Bank's Board of Directors. Jenson was terminated from his position by Lewis on behalf of the Board of Directors on December 18, 1992. (Cefalu, Tr. 765-768; Lewis Exh. 33.)

5. Crabtree, also a Respondent who entered into a settlement agreement prior to the commencement of the hearing, was hired by Jenson as a consultant to the Bank in July, 1991. (FDIC Exh. 121, pg. 1.) His services were

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[3] Even at that time the financial condition of the Bank did not permit the payment of fees to the Directors, and Lewis served for some time without compensation.

terminated by the Board of Directors on December 18, 1992. (Cefalu, Tr. 708; Lewis Exh. 33.)

C. THE BANK'S ECONOMIC CONDITION

6. In 1988. A "safety and soundness" examination of the Bank was conducted by the FDIC as of close of business May 13, 1988. The Report of Examination revealed serious asset problems which were eroding the Bank's capital position, resulting from charged-off loans and OREO property (Other Real Estate Owned as a result of foreclosure on the non-liquid asset of real estate pledged on defaulted loans). In addition, the Bank had negative earnings of $1.6 million for the year. Nearly 12 per cent of assets were subject to adverse classification, total adversely classified assets represented over 367 per cent of total liquid capital reserves, and the primary capital ratio had declined to 2.55 percent, defined as "Critical Deficit." (Cox Tr. 69-70; FDIC Exh. 177, pgs. 1 through 1-a-4.)

7. In 1990. Another safety and soundness examination of the Bank was conducted by the FDIC as of close of business May 4, 1990. The Report of Examination revealed that 10 percent of the bank's assets were subject to adverse classification, and that its primary capital ratio was still critically deficient at 2.55 percent. On September 11, 1990, the Regional Director of the FDIC's Memphis Region issued a Capital Directive ordering the bank to submit a plan to the FDIC's Memphis Regional Office within 60 days of the Capital Directive's issuance, detailing how the Bank would increase its capital, to eliminate its capital deficiency by injecting $4.7 million in capital by

January 31, 1991, and to achieve, and thereafter maintain, a total capital ratio of 6 percent by December 31, 1991. (Cox Tr. 73-73; FDIC Exh. 299, pgs 1, 1-a-1 and 1-a-3; FDIC Exh. 6.)

8. In 1991. The FDIC conducted another safety and soundness examination of the Bank as of the close of business on April 26, 1991 to assess the Bank's compliance with the Capital Directive of September 11, 1990. The Report of Examination revealed that the Bank had not complied with the requirements of the Capital Directive by failing to obtain the $4,700,000 capital injection required. It further revealed that the Bank's primary and total capital ratios were 2.13 percent, less than the 6 percent also required by the Capital Directive, that the Bank had continued asset problems resulting in adversely classified assets of over 250 percent of the Bank's total equity capital and reserves, that the Bank's Tier I leverage capital ratio was 1.04 percent, a critically deficient capital position, and that the Bank had massive problems. (Cox Tr. 75; FDIC Exh. 2, pgs. 1 through 1-a-5, 2, 3, 3-a, 3-a-1, 4, 4-a, and A-1.)

9. Based upon the results of the 1991 Examination, a joint meeting of the Bank's Board of Directors, the Louisiana Office of Financial Institutions, and the FDIC was held. Both Landry and Lewis attended the meeting. FDIC Assistant Regional Director McGovern advised the Bank's Board of Directors that the FDIC would proceed with an action to terminate the Bank's deposit insurance pursuant to section 8(a) of the FDI Act. (Cox Tr. 74-76.)

10. In 1992. The FDIC conducted a safety and soundness examination of the Bank as of the close of

business on February 14, 1992. The Report of Examination revealed that while the Bank still had not complied with the Capital Directive, the Bank's Tier I leverage capital had increased though it was still critically deficient at 1.5 percent, that the Bank's adversely classified assets were excessive and its charge-offs were impacting on its earnings, that the Bank's overhead was extremely high and was also impacting on the Bank's earnings, that the Bank had lost $341,000 in 1991, and that the $105,000 in net income earned for January 1992 would more than be eliminated by charge-offs, and, in summary, that the Bank's overall condition was such that it was a candidate for near term failure. (Cox Tr. 87-89; FDIC Exh. 3, pgs. 1, 3-a, confidential memo, and A-1.)

11. On September 17, 1992, a meeting of the Bank's Board of Directors was held, which approved one of three offers to purchase the Bank, which was thereafter recapitalized by the purchaser in December 1992.

D. CAPITAL ENHANCEMENT, AND PANGAEA

12. By 1991, it was clear that the Bank was in desperate need of a large infusion of capital in order to maintain a safe and sound capital condition, in the absence of which it would be imperative to sell the Bank on the best terms available.

13. Jenson had been employed by the Bank in 1988. Also in 1988, Jenson and Crabtree entered into a contract with then-Bank President Joshua Cox, in which they agreed to collaborate and pool their expertise in the purchase of troubled financial institutions. In 1991, upon

Cox's retirement from the Bank, the Directors engaged Jenson as President and Chief Executive officer, with a prohibition against being associated with any business which competed with the Bank. Jenson was a member of the Board of Directors. In August of 1991, Jenson hired Crabtree to act as consultant to the Bank at an initial salary of $1,000 per week. Without authority, Crabtree held himself out to customers as the Bank's "Director/ Merchant Banking Services," and, with Jenson, was eventually discharged by the Bank's Directors in December of 1992.

14. At all times relevant to the proceeding, Lewis was a partner at the firm of Cashe, Lewis, Moody and Coudrain (CLMC) In September – November 1991, Jan Sturgill [Moody] was an associate at the CLMC firm. Coudrain was the firm's managing partner. (Coudrain Tr. 970, 968) The Bank had been a client of the CLMC firm since the firm's inception in 1989. During the period 1991-1992 the Bank comprised 20-25 percent of Andre Coudrain's legal practice. During the period here involved, the Bank was CLMC's single largest client. (Coudrain Tr. 969-73.)

15. As of May 16, 1991, Lewis served as chairman of the Board of Directors' executive, incentive stock option, directors loan, property management, and trust committees, and was Secretary to the Board of Directors. (Cefalu Tr. 710; FDIC Exh. 61.) At all times relevant to this proceeding, Lewis also served as legal counsel to the Bank. (Ellaby Tr. 676, Cefalu Tr. 713; Figueroa Tr. 1654; FDIC Exh. 63; Landry Exh. 6.)

16. In August, 1991, Landry, Jenson, and Crabtree had prepared a booklet entitled "Pangaea: Finance With a Global Perspective." ("Pangaea Booklet".) Landry took responsibility for the Bank's capital projections in the Pangaea Booklet, and believed that it might be considered as a "poorly prepared" stock offering document. (FDIC Exh. 121, p. 1.) In August of 1991, Christi Ellaby ("Ellaby"), then a Bank employee responsible for the Bank's loan operations, training, liaison between the back office operations and the Bank's branches, the credit department compliance, and loan review, was asked to come in for some confidential work in typing, proofing, and reviewing the Pangaea Booklet. After having been employed by the Bank from 1985 through October of 1995, at the time of the hearing Ellaby was Manager of First American Bank and Trust, and had been engaged in banking for twenty five years. (Ellaby, Tr. 640-41.) Ellaby discussed the Pangaea Booklet with Landry and Jenson, and formed the opinion that the entity of Pangaea, being formed by and with Landry, Jenson, and Crabtree as principals, was clearly intended to be an enterprise separate and distinct from the Bank, and intended to control ownership of both Pangaea and of the Bank. (FDIC Exh. 11, Ellaby Tr. 649-651.) When she expressed her concerns with this to Landry, he responded that he knew exactly what he was doing. (Ellaby Tr. 651-652.)

17. The Pangaea Booklet speaks in terms of "a fully secure equity investment in a diversified U.S. commercial bank holding company" (Page 3), that "will be organized as a bank holding company" which "will own over 80% of First Guaranty Bank of Hammond, Louisiana" (Page 5), with plans for funding "the holding company" (Page

9), that "Senior management . . . consists of: Rick Jenson . . . Michael Landry . . . (and) Scott Crabtree" (Page 21). In reference to Pangaea, the booklet also states that it will be "A U.S. Bank holding company . . . " (Page 21). (FDIC Exh. 11.)

18. Following page 28, the Pangaea Booklet included a flow chart detailing how Pangaea's incorporators were to be given seventy percent of its common stock. As Pangaea incorporators, Landry, Jenson, and Crabtree would acquire 70 per cent of Pangaea's common stock without any investment. Outside investors could receive the remaining 30 per cent of Pangaea's common stock for a total investment of $16,000,000. Pangaea itself would obtain 80 per cent of the Bank's stock, so that Landry, Jenson, and Crabtree would exercise control of the Bank without monetary consideration. (Cox Tr. 117-118; FDIC Exh. 11, p. 29; FDIC Exh. 121, Attachment 2, p. 29.)

19. A document entitled "PANGAEA CORPORATION RECOMMENDATION: STRONG BUY", was also prepared in conjunction with the booklet. The first paragraph of this document begins:

> The management team of First Guaranty Bank, Hammond, Louisiana, is seeking funding through a financial holding company, Pangaea, to acquire controlling interest in (the Bank)."

The second paragraph begins:

First Guaranty Bank, Panagaea's acquisition target, . . . "

The first paragraph of the second page begins:

> Pangaea Corporation will be organized as a bank holding company . . . " (FDIC Exh. 121, attachment 3.)

20. A meeting of the Bank's Board of Directors, and an Executive Session of the Board, was held on August 8, 1991. Jenson and Landry attended these meetings. Lewis was not in attendance but, as Secretary of the Board, signed the minutes of the meetings thereafter prepared. Pangaea was presented as a Capital Enhancement Plan, and not as a plan for changing control of the Bank. (FDIC Exh. 71; FDIC Exh. 121, p. 1-2.) Cefalu, the Bank's former Chairwoman of the Board and Chief Executive Officer, testified that the Directors did not understand that the Bank would form a corporation, called Pangaea or otherwise, but understood that Pangaea was to be an *ad hoc* committee of the Bank. (Cefalu Tr. 759.) It was never the intention of the Bank's Board to authorize the incorporation of a Pangaea entity. (FDIC Exh. 70-90.) The Capital Enhancement Plan as presented would be a "phantom bank" or "strong arm" of the bank, formed for the purpose of raising capital for the bank through activities in which the Bank could not itself engage, and the proposed cost to the Bank was to be $25,000 or less, upon which basis the Directors approved the concept. (Cefalu Tr. 759, 769; Cox Tr. 187; FDIC Exh. 71, FDIC Exh. 121, p. 1-2; FDIC Exh. 14.)

21. On August 12, 1991, Jenson sent a letter with attachment jointly to FDIC Regional Director Houston, at Memphis, Tennessee, and Commissioner Murray, of the Louisiana Office of Financial Institutions, at Baton Rouge, Louisiana, in regard to plans to satisfy orders of capital

enhancement. The letter refers to an enclosed three-page Capital Enhancement Plan, dated August, 1991 and typed single space, and a copy of the twenty seven page Pangaea booklet, typed single space, with sixteen additional pages of tabular financial projections, entitled "Pangaea Corporation – Finance with a Global Perspective."

22. The Summary of the Capital Enhancement Plan provided, in pertinent part, that the Bank:

> . . . plans to form a holding company, Pangaea Corporation (Pangaea), which will raise $16,000,000. This money will be used to recapitalize First Guaranty Bank, to purchase the Bank's other real estate, and to expand into other products, services and markets."

The completion of this marketing effort was to take approximately 12 months and would be much less expensive, a public stock offering. The investment of $16 million was to be used as follows: $5 million to invest in convertible preferred shares of the Bank; $2.5 million in the Bank's common stock, so that together with the converted preferred shares will provide eighty per cent ownership of the Bank; $6.5 million for a limited partnership to purchase the Bank's "other real estate owned" portfolio; and, $2 million retained by Pangaea "to fund expansion in other markets." The Plan further explains that the investors will be provided with "options for 30 percent of the common shares of Pangaea. . . . The 30% options in Pangaea provide substantial long-term capital appreciation, since the holding company is free to expand products and services, and geographically through the acquisition of other banks." (Draft Pangaea Booklet Page

23) There is no mention of the ownership of the controlling seventy per cent of Pangaea, and, at least in the copy provided to the State and Federal Regulators, and no flow chart showing that 70 percent of the stock will go, without investment, to the "incorporators." The senior management team is stated to consist of "Rick Jenson, Chief Executive Officer" and "Michael Landry, currently Chief Financial Officer of First Guarantee Bank. . . . " Scott Crabtree is identified as having the responsibilities of "Non-Banking/Merchant Services." (FDIC Exh. 14.) Landry provided the projections, which he charitably describes as "more than aggressive." (FDIC Exh. 121, p. 1.)

23. Prior to August 15, 1991, Lewis had no connection with the Pangaea proposals. On that date, Lewis was called by Jenson to meet at the Bank after 5:00 P.M., where Jenson explained the Pangaea Plan to him. Lewis was told that 25 packets containing the Pangaea Booklet and Pangaea Corporation Recommendation: A Strong Buy; a traditional New Orleans mardi gras "king cake" with explanation of the tradition; and a letter of introduction written by Landry and Jenson to potential investors in Vancouver, British Columbia, were being sent by Federal Express at 6:00 P.M. that night, and that Lewis could not retain a copy. (Ellaby Tr. 652-654; Lewis Tr. 1248-1256; FDIC Exh. 121, pg. 2; FDIC Exh. 121, Attachment 2.)

24. During his August 15, 1991, meeting with Jenson at the Bank, Lewis was asked to reserve the corporate name Pangaea with the Secretaries of State for Delaware, Texas, and Louisiana. The name was already reserved in Texas and Delaware, and on August 22, 1991, Lewis reserved the name in Louisiana. (Lewis Tr. 1249, 1255-56.)

He also "calendared" the reservation at his office so that each time it was about to expire he could request an extension of reservation (Lewis Tr. 1255-1256.) Lewis prepared his file on "Pangaea, Incorporated," showing the Bank as the client and charged the reservation of the name to the Bank. (Coudrain Tr. 986; Lewis Tr. 1249, 1255-1256, 1275-1276; FDIC Exh. 300.)

25. The Bank's management held administrative committee meetings with bank employee Ellaby at which it was explained that the Pangaea Booklet was to be mailed to persons listed in a publication purchased by the Bank, naming the wealthiest persons in the world on a statistical basis. A Bank employee worked on the cover letter for the distribution. (Ellaby Tr. 652-54.)

26. The Pangaea packages were sent by Federal Express to Vancouver on August 15, 1991, and Landry, Jenson and Crabtree visited Vancouver from August 19 through 24, 1991, to meet with parties as previously arranged. (FDIC Exh. 121, p. 2.)

27. The Bank's executive committee met on August 26, 1991, with Landry, Lewis, and Jenson in attendance. Jenson distributed the Pangaea Booklets to those in attendance, to be returned at the close of the meeting, and orally reported on the Vancouver trip and the Pangaea Plan. The booklet now contained the flow chart diagraming the seventy per cent ownership of Pangaea being held by its "incorporators," and Pangaea's ownership of eighty per cent of the Bank. Lewis thumbed through the booklet, did not request a copy to read more thoroughly, and did not comment upon plans to incorporate Pangaea

with Jenson, Crabtree and Landry as incorporators. Likewise, at no time during the meeting did Landry advise that Pangaea was to be incorporated, and that he was to be one of the incorporators. (Cefalu Tr. 714-16, 718-19; Lewis Tr. 1253, 1402-03, 1700; FDIC Exhs. 72 and 121, Attachment 2, p. 29.) The first time Lewis saw the Pangaea Booklet it included the flow chart diagraming 70 percent of Pangaea's ownership being held by Pangaea's incorporators and Pangaea's 80 percent ownership of the Bank. (Cefalu Tr. 714-716; Lewis Tr. 1253, 1402-1403, 1700; FDIC Exh. 72; FDIC Exh. 121, Attachment 2, pg 29.)

28. At no time during the course of the executive committee meeting did Landry tell the Chairman of the Bank's Board of Directors, any of the Directors, or any member of the Bank's executive committee that the costs the Bank had already incurred for his, and Jenson and Crabtree's trip to Vancouver, British Columbia, were associated with Pangaea, a corporation which would be owned and controlled by Landry, Jenson, and Crabtree (Cefalu Tr. 718), or that the Pangaea package, with the Pangaea Booklet included, was for the benefit of Pangaea, which he would incorporate with Jenson and Crabtree. (Cefalu Tr. 719; FDIC Exh. 72.)

29. On August 31, 1991, the CLMC firm generated a bill to the Bank for the investigation and reservation of the name "Pangaea Corporation." The bill, in the amount of $107.50, referenced Pangaea Corporation. The second page of the bill contains the entry "8/22/91 letters to Secretary of State's office. The enumerated services were telephone calls to the Secretaries of Delaware, Texas, and Louisiana, and a letter to the Louisiana Secretary of State

with a check enclosed. (Cox Tr. 445-446; Coudrain Tr. 1015-1016; FDIC Exh. 133a, pg. 2-3.)

30. On August 30, 1991, the FDIC responded to the Capital Enhancement Plan provided it on August 11, 1991, as detailed above. The FDIC letter also transmitting a copy of the Report of Examination of April 26, 1991, advised that the agency considered the plan highly speculative, and that it would not be a viable method for providing the Bank with the short term capital infusion it would need to survive. (Cox Tr. 84-87; FDIC Exh. 296, p.1.) In pertinent part, the letter explained as follows:

> There is enclosed for your consideration a copy of the report of examination of your bank, . . . as conducted concurrently with State Examiner . . .
>
> The report discloses the bank to be in extremely poor condition as evidenced by an excessive volume of adversely classified assets, hazardously low capital, real earnings, an inadequate loan loss reserve, and numerous violations . . . The Bank failed to augment capital by $4,700,000 as required by Capital Directive issued by this office on September 11, 1990, and the Tier 1 capital ratio of 1.04 is dangerously low.
>
> We have reviewed the capital plan submitted by President Jenson on August 12, 1991. The plan makes no provision for a necessary injection in the short term and provides what appears at best to be a highly speculative prospect for large capital flows from international and corporate sources in the longer term. Little reliance can be placed on prospects for capital from local investors or merger partners as these avenues have been unsuccessfully explored for at least the

> past two years. Consequently, based on the examination findings and the inability of the board to provide for the recapitalization of the bank, we are recommending that deposit insurance termination procedures pursuant to Section 8(a) of the FDIC Act be initiated. . . .

31. On September 11, 1991, Lewis and Landry attended the meeting of the Bank's Board of Directors to address the letter from the FDIC Regional Director. Landry presented his usual financial report, but did not include that the Bank had paid for the incorporation of Pangaea, and did not advise the Board that pursuant to the proposal, he, together with Jenson and Crabtree, and without any investment by them, would jointly be the majority stockholders in Pangaea, which in turn would be the majority stockholder of the Bank. Neither Landry nor Lewis reported on the reservation of the name, or the incorporation of Pangaea. Lewis did not question the Bank's expenditure of funds for the trip to Vancouver, British Columbia, in light of the Bank's financial situation or the warnings contained in the FDIC's letter that the Capital Enhancement Plan was insufficient to meet the requirements of raising a large infusion of capital quickly. (Cefalu Tr. 720-24; FDIC Exh. 73.)

32. Pangaea continued to be variously described as a corporation, as a concept, as an arm of the bank, and as a tool in the search for capital contribution, but it was not incorporated until February 21, 1992, as "Pangaea, Inc." The incorporators were listed as Landry, Jenson and Crabtree, each of whom were to be Directors and agents for service of process. The corporate address was given as 106 South Magnolia Street, Hammond, Louisiana, the

address of Lewis' law firm, CLMC. (Coudrain Tr. 979-85; FDIC Exh. 8a and 8e.) Stock certificates were never issued. It is Lewis' testimony that at the time Pangaea Corporation was incorporated with its incorporators Jenson, Crabtree and Landry, the Bank's Board of Directors had not passed a resolution authorizing these individuals to form such corporation on the Bank's behalf. It is also his testimony that the only discussion of the Bank's Directors of filing a bank holding company application was years earlier, at a meeting in September 1991 when the formation of Pangaea was discussed as a capital enhancement plan. Lewis further testified that he did not know what a holding company application was, and that there was no discussion of filing one. (Lewis Tr. 1404-6.)

33. The FDIC conducted a safety and soundness examination of the Bank as of April 23, 1993, after the sale and recapitalization. (Cox Tr. 90; FDIC Exh. 4.) Field examiners acquired Bank documents and information which was forwarded to the FDIC's Memphis Regional Office for review and analysis. (Cox Tr. 90-93.) Pursuant to a questionnaire presented to him during the course of the examination, after much delay Landry presented a letter ("Landry Letter") to FDIC Examiner G. Martin Cooper on June 3, 1993, the contents of which he adopted at the hearing. (Landry Tr. 1793-1794; FDIC Exh. 121.) The letter is extensive, 21 single space typewritten pages with about 500 pages of attachments.

34. Based upon his review of the documents provided by the Bank, Bank Examiner Jerry Cox established the minimal loss to the Bank from operations of Landry, with Jenson and Crabtree, as $400,000. The losses, all hereinafter discussed, included $45,000 to William White

Bolles; $6,000 to Richard Crabtree; $5,000 per month to Dakin & Willison as fees relating to Funding Placement Services; $46,000 write-off on credit extended to William White Bolles; and $20,000 for a trip to Ecuador, among others. The loss would be far greater if attorney's fees for the litigation that ensued from these deals had been included in the total. (Cox Tr. 187-189, 264-268, and 309-311; Landry Exh. 60.)

E. EFFORTS AT CAPITAL ENHANCEMENT PRIOR TO SALE

35. The Capital Enhancement Plan identified four groups that it would target in the Bank's capital raising efforts: entities interested in acquiring a financial institution; domestic and international venture capital markets; Merger candidates; and individuals or groups which the Bank had previously solicited. (Cox Tr. 83-84; FDIC Exh. 14, pg. 2.) The following outlines some of the capital enhancement attempts of Landry, Jenson and Crabtree purporting to be included in this plan, some with and some without the proposed participation of Pangaea:

1. INTER AMERICAN INVESTMENT SERVICES AND AMER INVEST

36. In August 1991, changes in the U.S. immigration laws were proposed to allow foreigners to receive United States citizenship if they invested $1,000,000 in a new business venture in this country providing ten or more new employment positions each. Landry, Jenson, and Crabtree conceived of a partnership to be named Inter

American Investment Services, in which they, Lewis' law firm, CLMC, and, at one point, Greg Figueroa, the son of Coopers and Lybrand partner David Figueroa, who was the engagement partner of the Bank's outside accountants, would be partners. They also planned that a corporation, Amer Invest, would be formed to be the general partner. CLMC's contribution to the partnership was to be the performance of legal work. Landry, Jenson and Crabtree were to find foreign nationals seeking to obtain United States citizenship under the new legislation. Because the proposed law was similar to Canadian immigration laws, Landry, Jenson, and Crabtree made contacts concerning the Inter American Investment Services partnership during the trip to Vancouver, British Columbia. (FDIC Exh. 121, pg. 2, Figueroa Tr. 1602. 1668; Lewis Exh. 40.) Inter American Investment Services intended to use the Bank's then dormant trust department to perform services for the partnership. (FDIC Exh. 121, Attachment, pgs. 5, 7, 13, 14, 15, 20, 21, 23, 24; Lewis Exh. 41, pg. 34.)

37. The proposed changes in immigration laws and its role in the Pangaea Plan are set out in the Pangaea Booklet and were in the Capital Enhancement Plan forwarded to the FDIC on August 12, 1992. (FDIC Exh. 11, pgs. 10, 15, 21, 27; FDIC Exh. 14, Attachment 3; FDIC Exh. 121, Attachment 3, pgs. 10, 15, 21, 27.) Landry, Jenson, and Crabtree were to find investments for the foreign nationals seeking citizenship and the CLMC firm was to do the legal work related to the project. (Coudrain Tr. 1047-1048, 1057; Lewis Tr. 1266-1267, Figueroa Tr. 1668; Lewis Exh. 40.)

38. Lewis began reserving the corporate and trade names "Inter American Investment Services" and "Amer

Invest" with the Louisiana Secretary of State in October 1991 and continued to reserve these names through September 1992. (FDIC Exh. 265; Lewis Exh. 41.) At that point, the correspondence and information attached to the Landry Letter established Inter American Investment Services' address as 400 Thomas St., Hammond, LA, which is the Bank's address. (FDIC Exh. 121, Attachment, pgs. 13, 14.)

39. In late 1991, the members of the CLMC firm held a meeting and discussed entering the Inter American partnership with Landry, Jenson, and Crabtree. CLMC partners Lewis and Coudrain attended the meeting, and according to the notes taken by Coudrain, the partners in Inter American Investment Services were to be the CLMC firm; Respondent Landry; Crabtree; Jenson; and Amer Invest, a corporation acting as general partner. The partners were all to be equal. (Coudrain Tr. 1039, 1047-1048, 1055; Lewis Exh. 40.) It was common knowledge in the CLMC firm that it would become an equity partner in the partnership, that it would provide legal services in exchange for its partnership interest, and that it was not to bill the time it spent drafting Inter American Investment Services articles of partnership or Amer Invest's articles of incorporation to the Bank.

40. On October 22, 1991, CLMC received notification from the Louisiana Secretary of State acknowledging the firm's fax of October 18, 1991, and indicating that the names Amer Invest, Inc. and Inter American Investment Services were available for business use. (FDIC Exh. 265.)

41. Lewis had CLMC associate Jana Sturgill [Moody] do legal research on the changes in the immigration law. Andre Coudrain remembers that the memo was disseminated to the members of the CLMC firm on October 28, 1991. (Coudrain Tr. 1058-1061; Lewis Tr. 1267; FDIC Exh.s 131 and 131a.)

42. Also on October 28, 1991, Lewis wrote letters and sent CLMC operating account checks to the Louisiana Secretary of State's Office reserving the names for a period of 60 days. (FDIC Exh. 265.) On October 29, 1991, the Louisiana Secretary of State's office wrote Respondent Lewis confirming his reservation of both names until December 28, 1991. (FDIC Exh. 265.)

43. On October 31, 1992, CLMC sent a bill for $110.50 to the Bank with the reference line Pangaea Corporation, Alton Lewis account #15-AL091-2085-1A. The services listed were Lewis' calls, letters, and checks to reserve the names Amer Invest and Inter American Investment Services, between September 13, 1991, and February 26, 1992. (Coudrain Tr. 1019; FDIC Exh. 133.) Neither Coudrain nor CLMC associate Jana Sturgill (Moody) billed their time for their respective legal work on behalf of the Inter American Investment Services partnership or Amer Invest. (Coudrain Tr. 1054-1058; FDIC Exh. 131.).

44. Landry and Lewis both attended the Bank's Board of Directors meeting on November 14, 1991, at which Jenson presented a draft trust agreement which would be used by a partnership to attract $1,000,000 each

from foreigners who wanted to participate in the immigration scheme. The minutes of the meeting do not identify the partnership as being Inter American Investment Services. (Cox Tr. 136-137; Cefalu Tr. 725; FDIC Exh. 76.) However, Bank Director Bill Hood believes that the partnership was to be between Jenson and Crabtree, that Lewis was going to do the legal work for them, and that none of the expenses would be met by the Bank. (Hood Tr. 1725-26.) The Chairman of the Board testified that she did not hear of Inter American Investment Services until a deposition some time well after the November 14, 1991, meeting (Cefalu Tr. 725), and the secretary taking notes of the meeting testified that Lewis' law firm was only identified as the entity to assist the Bank in preparing the proper legal documents for the use by the Bank's trust department. (Drew Tr. 1749, 1778.)

45. Lewis testified that he did not see a potential conflict of interest between his and Jenson's roles as equity partners in the Inter American Investment Services partnership, an independent business operation to find investors in the immigration scheme using the Bank's trust department, and their roles in Amer Invest, with their roles as the majority of the board of director's three-member trust committee. (Lewis Tr. 1395.) At the meeting of the Bank's Board of Directors on November 14, 1991, at which the Inter American Investment Services partnership was discussed, Respondent Lewis failed to advise the Bank's Board of Directors that he and Jenson should recuse themselves from their role on the trust committee due to the proposed Inter American Investment Services' partnership proposal to use the Bank's trust department, nor did he identify Landry's interest in those entities.

Jenson and Lewis did, however, abstain from voting on the proposed form of trust agreement. (Lewis Tr. 1395; FDIC Exh. 76, page 2.)

46. On November 20, 1991, CLMC associate Jana Sturgill wrote a letter to Crabtree conveying research that Ms. Sturgill had done on the Inter American Investment Services' partnership. (Tr. 1043; Lewis Exh. 40.)

47. On December 26, 1991, the reservation of the names was extended to January 27, 1992. (FDIC Exh. 265; Lewis Exh. 41.) Further extensions were granted expiring respectively February 2 and 28, 1992, April 28, 1992, June 29, 1992, and August 27, 1992, and again until some time after September, 1992. (FDIC Exh. 265. Lewis Exh. 41; Coudrain Tr. 1022.)

48. Coudrain's review of his draft articles of formation for Amer Invest, Inc. and for Inter American Investment Services were prepared somewhere near the **end of 1991.** He believes that Lewis was aware that he, Coudrain, was preparing the formation of these entities at the time he was drafting them. (Coudrain Tr. 1045, 1053, 1056; Lewis Exh. 39.)

49. In July 1992, interest in Inter American Investment Services was renewed due to the finalization of the change in the immigration laws. (FDIC Exh. 121, pg.10.)

50. In May 1994, the CLMC firm refunded $65.50 to the Bank because Respondent Lewis realized that they had billed, and the Bank had paid, some charges for Pangaea, Inter American Investment Services, and Amer Invest, Inc. (Lewis Tr. 1276-1277.)

51. There is no indication that the scheme of raising investments in Pangaea through trust deposits in the Bank for the immigration scheme, through Inter American Services or otherwise, had any success whatsoever. In addition to the immigration scheme, the following additional transactions were undertaken.

2. DAKIN & WILLISON

52. Crabtree believed that "pension fund managers were considered a great source of investments for the Inter American Investment Services (immigration fund)". Dakin & Willison was believed to be an image enhancement firm which was recruited to be employed by major pension fund managers. In December 1991, Jenson, on behalf of the Bank, entered into a contract with Dakin & Willison, the purpose of which was to introduce the Inter American Investment Services concept, i.e. the immigration scheme to be handled through Pangaea, to different groups. (FDIC Exh. 121, pgs 3-4.) The retainer provided for payment from the Bank to Dakin & Willison the sum of $5,000 per month, plus expenses. In total, the Bank paid approximately $44,000 in varying amounts, through April 15, 1992. (Cox Tr. 123-124; FDIC Exh.s 15, 281, and 121, pgs. 3-4, 10; FDIC Exh. 121, Attachment 6.)

53. The Bank extended the retainer relationship with Dakin & Willison on March 20, 1992, and paid an additional $5,031 on May 15, 1992; $5,026 on June 30, 1992; $5,015 in July 1992; $5,840 on August 14, 1992; and $5,047 on September 15, 1992. (FDIC Exh. 281.)

54. Though she was the person responsible for credit, lending, and compliance, and other customer-

related matters, Bank employee Ellaby did not meet with anyone from Dakin & Willison to discuss the Bank's image or how to enhance it. Further, Ellaby was unaware of any other person at the Bank who met with Dakin & Willison. (Ellaby Tr. 695-696.)

55. As part of Bank employee Ellaby's managerial duties, she attended committee meetings which discussed the Bank's aiding immigrants in search of green cards and the possibility that prospective immigrants would invest in Pangaea. The meetings were ongoing as long as the Pangaea effort was in effect, approximately from September 1991 to September, 1992. (Ellaby Tr. 788-789.)

3. LENDERS OPTION CORPORATION

56. Another alternative to generate capital discussed in the Landry Letter is the "Lender's Option Corporation" referred to as the "LOC" concept. (FDIC Exh. 121, pg. 3; FDIC Exh. 121, Attachment 4.) This program was brought to the Bank by Landry, Jenson, and Crabtree, to "change the Bank's direction." (Ellaby Tr. 674-675; FDIC Exh. 121, Attachment 4, pricing committee information April 2, 1992.) LOC was an automobile securitization program whereby an insurance policy would be attached to an automobile loan contract to enhance the Bank's lending program, and the purchaser of the securitization would set their own interest rate.

57. These automobile loan contracts were to come from outside the Bank's lending area. (Ellaby Tr. 671- 672; FDIC Exh. 121, Attachment 3.) In addition, the program would require hiring additional Bank personnel at a time when the Bank was attempting to preserve capital by

carefully watching its overhead. In terms of soundness of the program, it involved the Bank's lending or buying grade C and D paper, a potential violation of Louisiana consumer credit laws. (Ellaby Tr. 672-673.) The LOC program was offered to a variety of foreign and domestic investors between September 1991 and August 1992. LOC required the investor to establish an account with the Bank's trust department and allowed investors to customize their rates of return. (FDIC Exh. 121, Attachment 4.)

4. WILLIAM WHITE BOLLES

58. Jenson entered into a contract on July 27, 1992, by which the Bank was obligated to pay William White Bolles ("Bolles") a monthly fee of $15,000,and at the same time granted Bolles a non-exclusive right to contact potential investors and raise capital either directly for the Bank or indirectly through a bank holding company such as Pangaea Corporation. (Cox Tr. 100, 174; Cooper Tr. 559-560; FDIC Exh. 121, pg. 11; FDIC Exh. 121, Attachment 11; and FDIC Exh. 273.)

59. Despite his opinion that the contract was not in the Bank's best interest, on July 27, 1992, Landry authorized a $15,000 payment to Bolles pursuant to the contract. (Cox Tr. 101, 174-175; FDIC Exh. 273, pgs. 6-7.)

60. The Memphis Regional Office of the FDIC reviewed the contract to Bolles and was unable to establish any benefit to the Bank for the payments made to him. (Cox Tr. 176.)

61. At about the time the Bank entered into the agreement with Bolles, the Bank extended credit to him

totaling $40,000. During the course of the FDIC's April 1993 examination, the FDIC reviewed this extension of credit, and the $8,000 then in accrued interest as well as the full amount of the credit were classified "loss" in part because of the weaknesses in the loan documentation, as well as a letter in the Bank's loan file from Bolles stating he was subject to an outstanding judgement of $26,000,719 for violation of "RICO," the Racketeering [sic] Influenced and Corrupt Organization Act. (Cooper Tr. 557-559; FDIC Exh. 274, last page; FDIC Exh. 4, pg. 2-a-12.) The Bank loans to Bolles referred to in the Landry Letter were charged off by the Bank. (Cox Tr. 178; FDIC Exh. 4, pg. 2-a-12; FDIC Exh. 121 pgs. 11-12; and FDIC Exh. 274.)

5. RICHARD CRABTREE

62. On July 30, 1992, Jenson executed and Landry witnessed a contract between the Bank and Richard Crabtree, Respondent Crabtree's father. Pursuant to the contract, Landry executed the check of Richard Crabtree, in the sum of $6,000, payment for one month of non-exclusive representation of the Bank in contacting potential investors. In addition to this sum, Richard Crabtree was granted pre-approved expenses in obtaining deposits into the Bank's trust department, and ten percent of the earnings of the Bank's trust department as a result of his efforts, for the following ten years. (FDIC Exh. 121, pg 11; FDIC Exh. 121, Attachment 12; FDIC Exh. 277; Cox Tr. 102-3, 181; Cooper Tr. 323.)

6. FUNDING PLACEMENT SERVICES – ROBERT F. SMITH[4]

63. On December 6, 1991, the Bank agreed to pay Funding Placement Services the sum of $20,000, to solicit individuals, partnerships, corporations, and other business entities to provide services in preparing a preferred stock offering for Pangaea Corporation. The agreement also granted Funding Placement Services the right to solicit individuals, partnerships, corporations, and other business entities to provide services to the Bank in preparing a preferred stock offering for Pangaea Corporation. The Bank check in payment was signed by Landry. (FDIC Exh. 151, pg. 5-6; FDIC 121, pg. 3-8 and Attachment 5; Cox Tr. 148-9, 163.)

64. Asset out in the Landry Letter, in April 1992, individuals associated with Funding Placement Services, including Robert G. Smith, of Las Vegas[5], traveled to Hammond, Louisiana, to meet with Landry,Jenson, and Crabtree. (Tr. 165; FDIC Exh. 121, pg.7.) Shortly after this April 11, 1992 meeting, Jenson and Crabtree traveled to Los Angeles to meet with an entity named "Blue Rose Investors." The Bank paid $15,000 to Funding Placement Services for facilitating the introduction, and the check to

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[4] There are two Robert Smiths involved in various loans discussed herein at this point and below. Robert *F.* Smith, of Chicago, Illinois, was referred to at the Bank and in the testimony at hearing as "Chicago Bob," while Robert *G.* Smith, of Las Vegas, Nevada, was referred to as "Las Vegas Bob."

[5] Robert G. Smith, of Las Vegas, is a different individual than Robert F. Smith, of Chicago, mentioned below. In the Bank, and in testimony here, they were distinguished by referring to one as Los [sic] Vegas Bob, and the other as Chicago Bob.

Funding Placement Services was signed by Landry. (Cox Tr. 164-165: FDIC Exh. 121, pg. 7; and FDIC Exh. 151: FDIC Exh. 151, pg. 3.)

65. The agreement was between Funding Placement Services and Robert F. Smith of Chicago, Illinois, for Robert F. Smith's introduction to Blue Rose Investors, MoniCorp, and MoniCorp Financial. (Cooper Tr. 545; FDIC Exh. 121, pgs. 6-7; FDIC Exh. 275.) There was a fee splitting agreement between Blue Rose and Funding Placement Services. (Cooper Tr. 545-547; FDIC Exh. 4; FDIC Exh. 121, pg. 7; and FDIC Exh. 151.) Through discussions with Landry and the documents reviewed during the course of the April 1993 FDIC examination of the Bank, FDIC Examiner in Charge Cooper understood that there was also a fee splitting agreement or business consulting agreement between Funding Placement Services and Pangaea Corporation. (Cooper Tr. 547; FDIC Exh. 121, Attachment 4, pg. 4; FDIC Exh. 4, FDIC Exh. 151; FDIC Exh. 151a.)

7. FUNDING PLACEMENT SERVICES - ROBERT F. SMITH LOAN

66. During discussions with FDIC examiners in 1993, Landry explained that when seeking capital for Pangaea, they encountered an entity named Funding Placement Services, which was trying to place restricted stock. The owner of the stock, Robert F. Smith, called Landry and the loan was funded sometime after these discussions. (Cooper Tr. 540-541; FDIC Exh. 121, pgs. 6-7.)

67. On May 5, 1992, on behalf of Pangaea Corporation, Landry entered into a Memorandum of Understanding with Funding Placement Services to evenly divide any loan fees and commissions on an equal basis. (Cooper Tr. 547; Landry Tr. 1879-1880; FDIC Exh. 151, pg. 4; FDIC Exh. 28; FDIC Exh. 121, pgs. 6-8.)

68. In June of 1992, pursuant to the Memorandum of Understanding, the Bank extended $450,000 in credit to Robert F. Smith. (Tr. 166; FDIC Exh. 28; FDIC Exh. 151, pg. 4; FDIC Exh. 121, pgs. 6-7; and FDIC Exh. 275.) Funding Placement Services was to help facilitate the use of Robert F. Smith's stock in USA Waste Services as collateral for the loan. (FDIC Exh. 121,pg 6-7.) During the course of the FDIC's April 1993 Bank examination, it was learned that the Bank's loan to Robert F. Smith was secured by stock on which a restriction existed. (Tr. 538-539; FDIC Exh. 4, pg. 2-a-10.) In addition, other peculiar and unusual circumstances of the loan were as follows:

> Although Landry was not a loan officer, he acted as the loan officer for this loan;
>
> Landry insisted upon acting as an intermediary between senior Bank loan officer Mike Lofaso and the borrower;
>
> The senior Bank loan officer handling the loan was opposed to the credit's extension and refused to present the loan application to the Bank's loan committee;
>
> Landry presented the loan application to the Bank's internal loan committee while the senior Bank loan officer was on vacation;

Landry had never presented a loan to the Bank's internal loan committee prior to his presentation of the Robert F. Smith loan;

The amount of the loan request, $450,000, was unusually large, the borrower was from out of the bank's lending area and otherwise unknown to the Bank, and the credit bureau reports on the borrower disclosed a number of judgments and liens.

(Cooper Tr. 540; Ellaby Tr. 656-661; FDIC Exh. 275.)

69. During the course of the Bank loan committee meeting at which Landry presented it, the loan was tabled and then later approved only upon Jenson's personal lending authority. (Ellaby Tr. 661-662; FDIC Exh. 4, pg. 2-a-10.) During the 1993 Bank Examination, the loan was classified "substandard" on the grounds that the borrower was out-of-territory; that the majority of the borrower's net worth was tied up in the restricted stock collateral; and the borrower's credit reports disclosed that there had been a forfeiture and several delinquencies on the part of the borrower. (Cooper Tr. 548-549; FDIC Exh. 4, pg. 2-a-10; and FDIC Exh. 275.)

70. This loan was also secured by a $100,000 certificate of deposit to be purchased with $100,000 of the loan proceeds. The stock pledged as collateral was not in the Bank's possession at the time the loan was extended, and the burden was placed on the Bank to gain possession of the collateral. (Ellaby Tr. 662-664; FDIC Exh. 4, pg. 2-a-10; FDIC Exh. 121, pg. 6-7.)

8. FUNDING PLACEMENT SERVICES – ROBERT G. SMITH LOAN

71. On March 24, 1992, the Bank loaned $13,000 to Funding Placement Services principal, Robert G. Smith, of Las Vegas, Nevada, for the purchase of a used 1980 Porsche automobile. (Cox Tr. 171; FDIC Exh. 276.) During the course of the 1993 Examination, the FDIC examined the loan and found that the loan was made about the time Pangaea's fee splitting agreement with Funding Placement Services was executed. (Cooper Tr. 555-556; FDIC Exh. 4.) Landry, Jenson and Crabtree directed that the loan be made despite problems in establishing the borrowers' *bona fides* (Ellaby Tr. 667-8). The credit bureau report on the borrower, run as a matter of course prior to the loan, disclosed that he had two different social security numbers. An investigator hired by the Bank could not determine whether Robert G. Smith of the address in Las Vegas, Nevada, actually existed. (Ellaby Tr. 666-667; FDIC Exh. 276.) Despite this, Landry, Jenson, and Crabtree put pressure on Bank employees to present the loan, which was approved. (Ellaby Tr. 667-668.)

72. The loan to Robert G. Smith went into default, (Ellaby Tr. 668; FDIC Exh. 276) and was charged-off by the Bank. (Cox Tr. 171; Cooper Tr. 558; FDIC Exh. 41 and FDIC Exh. 276.) Because the borrower and the collateral-pledged to the loan were out-of-state, it was difficult and expensive for the Bank to regain the loan collateral. (Ellaby Tr. 668; FDIC Exh. 276.) The Bank ultimately paid for the collection efforts and liquidated the Porsche collateralizing the loan. (Ellaby Tr. 668; FDIC Exh. 276.)

9. MISCELLANEOUS ASSOCIATED TRANSACTIONS

73. The Landry Letter discusses his recollection of a multi-faceted relationship between the Bank, Pangaea, and various entities associated with Funding Services, George Russell, Patrician Corporation or Place Vendome, and for Landry to act as a trustee or escrow agent for Place Vendome, transactions through Funding Placement Services, Centrex International, and travel to Quito, Ecuador, Warsaw, Poland, and London, England with Russell's associate, Byford Beasley. (FDIC Exh. 121, pgs. 2, 3, 7, 8, 9, 11, 12 and 15, and Attachment 5, pgs, 5, 6, 8 , 9, 10, 11.)[6]

74. GABL Corporation consisted of four individuals – Byford Beasley, George Russell, Adolph LaPlace, and Lenny LaPlace. (Tr. 524; FDIC Exh. 4, pg. 2-a-4.) George Russell was the executive vice president of Hannover

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[6] Following the testimony of Commission Bank Examiner Cooper, who has worked for the FDIC over nine years and conducted approximately 180 bank examinations, regarding the contents of this letter, the undersigned asked the following (Tr. 629):

JUDGE ALPRIN: . . . Did you find any of the deals outlined in Mr. Landry's letter as having been undertaken by the bank, by Pangaea, by Mr. Jenson or what-have-you as somewhat bizarre?

THE WITNESS: Bizarre is an understatement, Your Honor.

JUDGE ALPRIN: Have you ever run into anything like that in any of your examinations?

THE WITNESS: Not even close, Your Honor. Not even close.

Corporation, which was the holding company for Place Vendome. Byford Beasley was the president of Place Vendome. (Cooper Tr. 573; FDIC Exh. 121, pg. 8.)

75. On April 2, 1992, Jenson authorized a loan of $450,000 to GABL Corporation. (Cooper Tr. 513-526; FDIC Exh. 4, pg. 2-a-4.) The loan was placed through Placement Services. This was a real estate loan for approximately 904 acres of vacant real estate located east of Baton Rouge, Louisiana. The Bank took a second mortgage on the property to secure the loan to GABL Corporation, but did not obtain a financial statement on the borrowing entity, GABL Corporation. The Bank did not obtain an appraisal on the GABL loan collateral and really had nothing by which to value the property as of the day the credit was extended. (Cooper Tr. 524-526; FDIC Exh. 4, pgs. 2-a-4, 2-a-10.)

76. After the loan had been made, the Bank discovered that there was a cemetery on the property which was the collateral for the loan, and as a result, it would be virtually impossible to sell the property. (Ellaby Tr. 694.)

77. The loan was classified "substandard" during the 1993 Examination due to the loan's underwriting deficiencies and subordinate collateral position. (Cooper Tr. 513-526; FDIC Exh. 4, pg. 2-a-4.)

78. The above loan, to GABL and through Placement Services, was for the development of a shopping mall at Baton Rouge, Louisiana, named Place Vendome. The principals of GABL Corporation, Beasley, Leonard LaPlace, Adolph Laplace and George Russell, together with one Sam Recile, were involved. (Cooper Tr. 5271 FDIC Exh. 121, pg. 7-8.)

79. Landry acted as either escrow agent or trustee for the wire transfer of funds. Place Vendome was not a customer of nor have a relationship with the Bank, and it thus did not have a trust account into which to deposit funds until paid out. Nonetheless, Landry transferred Place Venom's [sic] moneys through a trust account without any trustee relationship or trust instrument or agreement, in a trust department which had been dormant since 1984. During the time the Trust Department was operational there had been a charge of between $10 and $15 for wire transfers, but no charges or fees were applied to these transfers for Place Vendome. (Landry Tr. 1897-9; Cooper Tr. 528, FDIC Exh. 121, pgs. 7-8 and Attachment 9.)

80. On April 17, 1992, a document entitled, "Agreement Regarding Letter of Credit Transaction," bearing the signatures of George Russell for Place Vendome Corporation of America and Paul Kerrigan for Funding Placement Services, was signed with Respondent Landry as witness. The Agreement concerned a letter of credit transaction between Place Vendome Corporation of America and Patrician Corporation as the clients and Funding Placement Services as the counter party. (Landry Tr. 1878, 1881; FDIC Exh. 190, FDIC Exh. 291.) On May 5, 1992, Respondent Landry wrote a letter to George Russell of Place Vendome Corporation indicating that the Bank, through its trust department, had established a relationship with Place Vendome to act as Place Vendome's escrow agent for the procurement of letters of credit and other financing for the Place Vendome project. (Landry Tr. 1881; FDIC 121, pgs. 7-8; FDIC Exh. 121, Attachment 9; FDIC Exh. 291.) Prior to the agreements among Place Vendome and

Funding Placement Services and Pangaea Corporation, and prior to the letter to the Bank concerning the pending SEC matter against Place Vendome, Landry had handled five wire transfers for Place Vendome; after the agreements and the letter, Respondent Landry handled an additional twenty-four wire transfers on behalf of Place Vendome. (Landry Tr. 1892-1898.)

81. George Russell. on behalf of Place Vendome, authorized the release of $300,000 to the Bank, to Centrex International, and to Funding Placement Services, which had a fee slitting agreement with Pangaea on fees earned for the receipt of a $15,000,000 letter of credit. (FDIC Exh. 121, pgs. 7, 8, 9; Attachment 5, pgs. 6, 8, 9, 10, 11.)

82. Respondents Landry and Jenson traveled to Quito, Ecuador, with non-Bank individuals, GABL Corporation principal Byford Beasley, a man named Nix, and Nix's girlfriend. During the 1993 Examination, Respondent Landry described to Examiner in Charge Cooper the purpose of his trip as meeting someone named Ed Neal to investigate a way he and the other travelers were going to capitalize Pangaea. Landry was told of a "little known secret" that in Ecuador one could invest $200,000 in U.S. dollars and in the short time of six weeks flip the amount up to a million dollars, and that the trip to Ecuador was to investigate this investment and see if it could help Respondents Landry and Jenson raise capital. (Cooper Tr. 528, 575-576; FDIC Exh. 121, pg. 9.) On terms set out in letters from Jenson and Landry, under the letterhead of Pangaea Corporation, address given as that of Lewis' law firm, to Ed Neal of Quito, Ecuador, on June 15, 1992, a $4,000,000 letter of credit was to be issued by First Guaranty Bank on behalf of Pangaea Corporation and

$2,000,000 would be put in trust to be held by the Bank's trust department. (Tr. Cox 475; FDIC Exh. 142.) A letter and agreement in Landry's files at the Bank were from Landry to Ed Neal wherein Landry explains that the Bank will act as escrow agent and that the Bank will not bear any liability or responsibility. The purpose of the agreement attached as the "stock purchase agreement" was to provide a (U.S.) $3,000,000 loan to Pangaea Corporation which would then provide $3,000,000 in Ecuadoran currency, which in turn would be utilized to purchase $6 million U.S. dollars in common stock of the Bank, thus recapitalizing the bank and placing control of the Bank in the hands of the incorporators of Pangaea Corporation. The security for the loan was a pledge of all shares of Pangaea Corporation and the bank shares purchased with the proceeds from this transaction. (Cox Tr. 589-591; FDIC Exh. 121, pgs. 9-10.)

83. The bank incurred travel expenses in the amount of $20,000 to send the Bank and non-Bank personnel to Quito, Ecuador, in June 1992. (Cox Tr. 265; FDIC Exh. 121, pg. 9-10; and FDIC Exh. 270, dated 6/9/92.)

84. A letter from Landry to Ed Neal in Quito, Ecuador, stated:

> *Pangaea Corporation will grant* up to a 15 percent interest in its current outstanding common equity as of June 15, 1992, to a trust held by Rothschild Trust on behalf of you or your assigns, heirs or affiliates. Such stock will be granted incremental in three installments as the preferred stock investment described in item 1 is funded. For each $2 million in preferred stock, Pangaea Corporation will grant 5 percent of the

> current June 15, 1992, outstanding common equity. For such consideration, you agree not to support any action now or in the future that would result in the dilution of the ownership interests of Mr. Rick Jenson, Mr. Michael D. Landry and Mr. Scott P. Crabtree, 85 percent collectively, unless support of such action is executed by Mr. Jenson and Mr. Landry as duly authorized proxies on your behalf.

(Underlining added.) (Cox Tr. 473-474; FDIC Exh. 121, pg. 9-10; FDIC Exh. 142.)

F. PAYMENT OF TRAVEL COSTS AND EXPENSES

85. Lewis and Chairwoman Cefalu were responsible for reviewing and approving travel and expense reports. Lewis would review the travel and expense reports and initial the expenses he approved. (Cefalu Tr. 744; Lewis Tr. 1299; FDIC Exh. 270.)

86. Lewis initialed the travel voucher for Jenson's travel and expense report dated September 17, 1991, for travel by Landry, Jenson and Crabtree to Vancouver, British Columbia, for discussion of "capital/immigration funds.". (Cefalu Tr. 746-7, Lewis Tr. 1485, FDIC Exh. 270.) As noted above, the purpose of the trip was to seek investments for Pangaea.

87. Lewis did not investigate the expenses incurred by Landry, Jenson, and Crabtree on October 8, 1991, in order to ensure that they did not relate to the immigration fund plan through Inter American Investment Services partnership. (Cefalu 747; Lewis Tr. 1486-1490; FDIC Exh. 270.)

88. Lewis initialed Jenson's travel and expense vouchers dated January 10, January 27, February 26, February 4, March 9, March 20, 1992; and April 20, 1992, which included Pangaea-related expenses regarding Dakin & Willison, Blue Rose Investment corporation, and immigration fund. (Cefalu Tr. 748-749; FDIC Exh. 270.)

89. Jenson's travel voucher dated March 9, 1992, was approved and authorized by Lewis for costs incurred on March 2, 1992, in connection with discussions among D. Figueroa, J. Daigle, and Crabtree and Jenson concerning the immigration fund. Lewis did nothing to assure himself that these expenses were not related to Inter American Investment Services. (Cefalu Tr. 749; Lewis Tr. 1443-1444, and 1491-1492; FDIC Exh. 270.)

90. Jenson's travel and expense voucher dated April 20, 1992, initialed by Lewis, included costs incurred in connection with meetings with Blue Rose Investment Corporation. (Cefalu Tr. 750; FDIC Exh. 270.)

91. Lewis approved and authorized payment of Jenson's travel and expense voucher dated May 13, 1992, which included the costs associated with the trip of Jenson, Landry, and others to Quito, Ecuador. (Cefalu Tr. 750-751; FDIC Exh. 270.)

92. In his capacity as chairman of the Bank's executive committee, Lewis signed Jenson's travel and expense voucher for the trip to Quito, Ecuador, without making any inquiries as to what the purpose of the trip was or how it benefitted the Bank. (Lewis Tr. 1492-1493.)

93. Lewis initialed Jenson's travel and expense voucher dated July 15, 1992, for a meeting by Jenson,

Crabtree, and J. Bentivegna to discuss the immigration fund brochure. Respondent Lewis did not make any inquires [sic] to assure himself that these expenses were not for the Inter American Investment Services partnership. (Cefalu Tr. 752-753; Lewis Tr. 1492-1494; FDIC Exh. 270; FDIC Exh. 121 (Inter American Investment Services Attachment); Lewis Exh. 41, pg. 37.)

I. FIDUCIARY DUTIES AND DIRECTORS' MEETINGS

94. It was Lewis' practice generally not to read the minutes of the meeting that he signed as the secretary to the Board of Directors. This practice continued through 1991 and 1992. In his role as secretary to the Bank's Board of Directors, Lewis would go to the Bank after the draft minutes for the board meeting had been edited by Jenson without reading them or verifying the contents with other directors or anyone else to ensure their accuracy, would sign them. (Lewis Tr. 1390-2.)

95. During the meeting of the Bank's Board of Directors on January 9, 1991, Landry presented the monthly financial statement, but did not disclose that he and Jenson had entered into a consulting arrangement with Funding Placement Services which required the Bank to pay $20,000 for the Pangaea Corporation concept. (Cefalu Tr. 727; FDIC Exh. 80; FDIC Exh. 121, pg. 4-5.)

96. Landry was present at the February 28, 1992, special meeting of the Bank's Board of Directors, and did not disclose that he and Jenson and Crabtree had caused the incorporation and were the incorporators of Pangaea. (Cefalu tr. 729-730; FDIC Exh. 82. Lewis Tr. 1410-1411;,

and 1432; FDIC Exh. 82.) While Lewis was not at that meeting, he thereafter signed the minutes, but did not disclose to any of the Board that his law firm had incorporated Pangaea. (Cefalu Tr. 730, 769; FDIC Exh. 82.)

97. Landry attended the March 12, 1992, meeting of the Bank's Board of Directors and did not disclose that he, Jenson and Crabtree had formed Pangaea; nor did Landry disclose that he, Jenson and Crabtree were Pangaea's sole incorporators or that the CLMC firm had performed the legal work required to incorporate Pangaea. (Cefalu Tr. 733; FDIC Exh. 83.) Lewis likewise attended the meeting and also did not disclose to the board that the CLMC firm incorporated Pangaea on behalf of Landry, Jenson, and Crabtree. (Cefalu Tr. 734-735, 769; FDIC Exh. 83.)

98. Lewis and Landry attended the Bank's Board of Directors meeting on May 21, 1992. Landry did not disclose that on behalf of Pangaea, he had agreed to split fees with Funding Placement Services; that he had agreed to act as trustee or escrow agent for Place Vendome; or, that credit had been extended to Funding Placement Services principal Robert G. Smith. (Cefalu Tr. 737-738; FDIC Exh. 86; FDIC Exh. 291.)

99. Landry attended the August 13, 1992, Board of Directors meeting. Landry did not disclose the contract requiring the Bank to pay William White Bolles $15,000 per month for his services on behalf of a bank holding company such as Pangaea; or that the contract with Richard Crabtree required a payment of $6,000 and the Bank's payment of 10 percent of the income from the trust department for 10 years; or that he had used Bank funds

to make payments to William White Bolles and Richard Crabtree. (Cefalu Tr. 743-744; FDIC Exh. 89.)

100. The minutes of Board meetings do not reflect, and Lewis, secretary of the board, does not have an independent recollection that Landry disclosed to the directors the fee splitting arrangement he signed on behalf of Pangaea with Funding Placement Services. (Lewis Tr. 1417; FDIC Exh.s 85-89.)

101. The minutes do not reflect, and neither Lewis not the secretary taking noted [sic] at the meeting have an independent recollection, whether Landry disclosed to the Board Meeting the contracts or agreements that were entered into with William White Bolles, Richard Crabtree, Funding Placement Services, Blue Rose Corporation, or Place Vendome. (Lewis Tr. 1284, 1430-1433; FDIC Exh.s 86-89.)

102. The minutes do not reflect, and Lewis, the of the board, does not have an independent recollection that Landry disclosed to the Directors that Landry had witnessed, entered into, or used Bank funds to pay William White Bolles, Funding Placement Services, Richard Crabtree, Blue Rose Corporation, or Place Vendome. (Tr. 1284; Lewis Tr. 1430-1432; FDIC Exh. 86-89.)

103. At no time during the Board of Directors meetings held prior to September 16, 1992, attended by Lewis, did Landry disclose to the Board any of the self-dealing contracts or expenses that were approved by Lewis and paid on behalf of Pangaea or Inter American Investment Services. (Lewis Tr. 1438-1440.)

104. Landry resigned from his positions at the Bank by a letter to Jenson, dated September 16, 1992. (FDIC Exh. 119.) Excerpts from the letter are as follows:

> This letter is to advise you of my immediate resignation
>
> . . .
>
> You have hired numerous "experts" who, for a sizable fee, offered to assist us in our efforts to capitalize Pangaea Corporation and acquire controlling interest of First Guarantee Bank. Funding Placement Services, Richard Crabtree, Dakin & Willison, William Bolles, and others – most have come and gone. All were contracted with on trips or in meetings where I was not present. In most cases, the amount of dollars spent has been proportionately greater than the services rendered.
>
> . . .
>
> Whether or not I have been intended to be the scapegoat all along, I do not know. I only know that I can no longer condone the "self dealing" nature of the transactions which have been entered into for the good of Pangaea Corporation at the expense of First Guaranty Bank. Nor can I endorse any transaction to our Board of Directors without the complete and full disclosure of the potential "self dealing" transactions into which we have entered.

(Underlining added.) It was some time after this, June 3, 1993, that Landry provided a fairly complete, though rambling, sixteen page single space typed letter to the FDIC Examiner in Charge of the then current examination, FDIC Exh. 121, with attachments of roughly 500 pages, as discussed above.

IV. DISCUSSION

Authority to remove an institution-affiliated party from his position at a federally insured depository institution, or to prohibit an institution-affiliated party from further participation in the affairs of a federally insured depository institution, is granted by Section 8(e) of the Federal Deposit Insurance Act, 12 U.S.C. 1818(e). That section sets out a three prong criteria – the "misconduct", the result of which has a particular "effect," and the "culpability" involved. Below is the statutory overview and criteria for a prohibition.

A. Statutory Overview

In order to prohibit an individual from further participation in the affairs of a Federally insured depository institution, 12 U.S.C. § 1818(e), requires findings as follows:

> a) There must be a specified type of *misconduct* – violation of law, unsafe or unsound practice, or breach of fiduciary duty;
>
> b) The misconduct must have the effect of financial gain to the Respondent, or financial harm or other damage to the institution; and
>
> c) The misconduct must involve *culpability* through either personal dishonesty, or willful or continuing disregard for the safety or soundness of the institution.

In the instant case, Respondents are charged with all three alternative forms of misconduct set out in this above-referenced section.

B. Misconduct

1. Violations of Law

a. Failure to Provide Material Information

Section 12(i) of the Securities Exchange Act of 1934, 15 U.S. [sic] § 78, contains filing requirements for entities within its jurisdiction. Pursuant to its authority, the Federal Deposit Insurance Corporation has issued Part 335 of 12 Code of Federal Regulations, containing filing requirements of all securities of an insured bank.

Respondent Landry is charged with failing to disclose material information in quarterly and annual filings made to the FDIC in violation of 12 C.F.R. 335. The purpose of that section is to ensure that investors and regulators are adequately informed of the current financial condition of the bank. Subpart C of Part 335, Bank Reporting, relates to various filing requirements, and section 335.330 applies to required Form F-4, the Quarterly Report, providing as pertinent that:

> Every registrant bank shall file a quarterly report in conformity with the requirements of Form F-4 for each fiscal quarter . . .

Section 331 sets out the form for the quarterly report, Form F-4, in part at Item 2, as follows:

> *Item 2 – Management's Discussion and Analysis of Financial Condition and Results of Operations*
>
> Management's discussion and analysis of the financial condition and results of operations shall be provided so as to enable the reader to assess material changes in financial condition and results of operations . . .

Section 350 states as follows:

Additional Information.

> In addition to the information expressly required to be included in a statement or report, *there shall be added such further material information if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading.*

(Last emphasis by underlining added.) Finally, Section 102(x) provides that:

> The term *material* when used to qualify a requirement for furnishing of information as to any subject, limits the information required to those matters as to which an average prudent investor ought reasonably to be informed.

As the Bank's principal financial officer or chief accounting officer, it was Landry's obligation to manually execute the quarterly reports. 12 CFR § 335.331, section "E", *Signature and Filing of Report.*

As to Lewis' responsibility, while his failure to see that material information was included in the quarterly reports was not in violation of the cited Regulation, his failure to bring factual matters to the attention of the Board should be added to the factors discussed as evidence of his participation in unsafe and unsound banking practices, and breaches of fiduciary responsibilities. Because the issues are intertwined, they are here discussed as to both Landry and Lewis, and in the section referring to unsafe and unsound activities and breach of fiduciary duty shall be referred to again.

The goal of the securities laws is to fully inform shareholders and regulators of material information in a manner and time that allows them to act on the information. The very purpose of the periodic securities filing requirements, such as those found at Part 335 of the FDIC Rules, is to ensure that investors, as well as supervisors, receive adequate information concerning the operation and financial conditions of the bank. *See*, e.g., *SEC v. Kalvex, Inc.*, 425 F. Supp. 310 (S.D.N.Y. 1975). Expressing Congress' clear intent that investors receive adequate information about the operations and financial condition of a bank, section 13(a) of the Exchange Act requires that such reports be true and correct and failure to comply with such would result in a violation of the securities laws. *Id. Accord, SEC v. Savoy Indus.*, 587 F.2d 1149, 1165 (D.C. Cir. 1978), *denied sub nom. Zimmerman v. SEC*, 440 U.S. 913 (1979) In *Kalvex*, 425 F. Supp. at 315, the court reviewed the defendant's failure to disclose certain facts to shareholders and ruled that "undisclosed facts [which] might . . . [lead] a reasonable stockholder to question the [defendant's) integrity . . . and . . . ability to discharge . . . fiduciary duties" were material and required to be disclosed. *Id.* at 310, 315.

Landry's failure to disclose the material information in quarterly and annual filings made to the FDIC deprived stockholders and bank regulators of the ability to uncover Lewis' and Landry's conflicts of interest and Landry's attempted appropriation of the Bank. Lewis' failure to insure the proper disclosure of information to which he was privy, robbed shareholders of their right to be informed of material facts concerning their Bank.

The power to enforce and administer sections 12, 13, 14(a), 14(c), 14(d), 14(f), and 16 of the Exchange Act is vested in the FDIC for securities issued by banks and savings institutions in which deposits are insured in accordance with the FDI Act. Section 12(i)(3) of the Exchange Act, 15 U.S.C. § 78l(i). This section of the Act also grants the FDIC the authority to promulgate the rules and regulations necessary to carry out the duties assigned to it. The FDIC has promulgated these regulations at 12 C.F.R. Part 335.

As noted above, the Regulations make clear that material information is that which a reasonable investor would consider in making a decision regarding the security. Courts have articulated the test for materiality in a number of ways. "[Materiality was] determined by the substantial likelihood that a reasonable person would attach importance to the matter in question. *SEC v. Joseph Schlitz Brewing Co.*, 452 F. Supp. 824, 832 (E.D. Wis. 1978). "Material facts are facts which a reasonable stockholder in the process of deciding how to vote might consider important." *SEC v. General Refractories Co.*, 400 F. Supp. 1248, 1257 (D.D.C. 1975). "[T]he materiality of facts is to be assessed solely by measuring the effect the knowledge of the facts would have upon prudent and conservative investors." *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968). The United States Supreme Court has held that [a]n omitted fact is material if there is substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *TSC Indus. v Northway Inc.*, 426 U.S. 439, 96 S. Ct. 2126, 48 L. Ed. 2d 757 (1976).

Insuring shareholders' access to information is of such importance that the very act of filing a quarterly report which contains false or misleading information is a violation of section 13(a) of Exchange Act. *SEC v. Benison*, 657 F. Supp. 1122 (S.D.N.Y. 1987); and *SEC v. World-Wide Coin Inks.*, 567 F. Supp. 724 (N.D. Ga. 1983). Likewise, the act of filing a report which omits material information required to be included by statute or regulations is a violation of section 13(a) of the Exchange Act. *SEC v. ,D:] Indus.*, 421 F. Supp. 691 (D. Mass. 1976), *aff'd*, 552 F.2d 15 (1st Cir. 1977); and *General Refractories Co.*, 400 F. Supp. at 1248. Where an individual has intentionally falsified regulatory filings, it is particularly important to take aggressive enforcement action against the responsible party. Otherwise, the perception may develop that there are no consequences to submitting false regulatory filings and little benefit to telling the truth. *In the Matter of Ghaith R. Pharaon*, Docket Nos. 991-037-CMP-I1 1-037-E-I1, 1997 WL 125217 (F.R.B.); *In the Matter of Ghaith R. Pharaon*, Docket Nos. 991-037-CMP-I1 1-037-E-I1, Recommended Decision, April 12, 1966, page 115; *aff'd* 135 F.3d 148 (D.C. Cir. 1998). For this reason civil monetary penalties have been assessed for failure to fully follow the audit certification requirement in filing periodic disclosures found in Regulations. The failure to comply with the applicable reporting requirements are not "trivial, nor are they mere technical deficiencies. *In the Matter of CBC INC., and Lynell G. Skarda Langdon L. Skarda and Kent Carruthers*, Docket Nos. 90-033-CMP-BHC, 90-033-CMP-I2, 90-033-CMP-I3, 1992 WL 685196 (F.R.B.).

By any measure, a proposed or potential change in bank control is material information which must be disclosed, as the very act of incorporation of a bank holding company for a financial institution is material information to the functions not only of stockholders, but of regulators as well. The FDIC considers a proposed or potential change in control as being of such materiality that its disclosure is expressly required by the FDIC Rules, 12 C.F. R. § 335.312, item 4. Similarly, the very act of incorporating a corporation which will serve as a holding company for a financial institution is material information, and is required to be disclosed to shareholders and bank regulators.

Other information which a prudent shareholder would deem material in making a decision in investing in a financial institution includes information that the Bank was planning to expand into untried fields, having little if anything to do with banking. Further, that the Bank's three most influential insiders, its president and chief executive officer, its chief financial officer and cashier, and its full time, in-house, turn-around consultant, while supposedly continuing their employment by the Bank, have gone into partnership with the Bank's law firm in a commercial venture in part utilizing the Bank's resources, is certainly material information, and certainly of particular interest to the Bank's regulators.

Based on the above case law and expert testimony of Dennis Chapman,[7] there were four events which should

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[7] Dennis Chapman is a licensed certified public accountant with a Masters Degree in Business Administration from George

have been disclosed by Landry and Lewis between August 1991 and September 1992.

The first event occurred with the Bank's Board of Directors' approval of the Capital Enhancement Plan. The plan in part contemplated the establishment of a bank holding company to be known as Pangaea. Although the Board of Directors did not approve the establishment of the holding company at the meeting of August 8, 1991, the Board did approve the concept of turning to foreign markets and entering into new business opportunities never utilized by the Bank. The change is business concept was material and thus to be reported pursuant to 12 C.F.R. § 335.

The second event occurred at the time Landry, Jenson, and Crabtree, the Bank insiders, determined to employ the Pangaea concept for the self-serving purpose of utilizing bank money to fund their ownership of the bank holding company and thus control the Bank. According to the Landry Letter, this event occurred on or about August 8, 1991, and continued until September 1992. (FDIC Exh. 121, pgs. 1-3.) Likewise, such a determination was material and reportable.

Washington University. He has served as a staff accountant in the FDIC's Registration, Disclosure and Securities Operations unit for 19 years. He was trained in public company reporting disclosure requirements by the Securities and Exchange Commission and has specialized in public company reporting for 23 years. Mr. Chapman was qualified as an expert in the FDIC regulations pertaining to financial institutions' public disclosure requirements. (Tr. 891.)

The third event occurred with the incorporation of Pangaea by Landry, *Jenson*, and Crabtree on February 21, 1992. The very act of Bank insiders incorporating and establishing a bank holding company which further supports a potential change in control is material for disclosure purposes.

The fourth event occurred at the time it was decided by the Bank insiders and Lewis and his law firm to enter into disparate business ventures known as Inter American Investment Services and Amer Invest, Inc., associated with the Bank and using the Bank's resources for the their own benefit. Based on testimony, this joint venture surfaced in the fall of 1991, when Lewis began reserving corporate and trade names, and continued into 1992.

Certainly, Landry and Lewis cannot deny having knowledge of these events. On August 8, 1991, Landry attended the meeting at which the Bank's Board of Directors approved the Capital Enhancement Plan. Subsequently, Landry actively participated in the drafting of the Pangaea Booklet which clearly set out the future establishment of a bank holding company to be owned by the Bank's principal officers. (FDIC Exh. 11, pg. 29.) He also drafted the financial projections for the Pangaea Plan based upon his projections for the Bank's revenue. Landry himself considered the Pangaea booklet a stock offering document.[8] In mid August 1991, Landry traveled to Vancouver, British Columbia, to garner support for the Pangaea Plan and the yet-to-be-formed Inter American Investment Services. In December 1991, Landry paid

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[8] FDIC Exh. 121, pg. 1.

Bank funds to Funding Placement Services' draft a preferred stock offering. (FDIC Exh. 121, pgs. 3-4,7.) By February 21, 1991, FDIC Exh. 121, pg. 1.

Landry, along with Jenson and Crabtree, had Coudrain incorporate Pangaea, and named themselves as incorporators, directors, and agents for service.

By October 1991, the CLMC partnership had met concerning Inter American Investment Services and Lewis had directed CLMC associate, Jana Sturgill, to investigate the changes in the immigration law. Lewis' partner, Coudrain, discussed the Inter American Investment Services partnership with Jenson in December of 1991 and the CLMC law firm held meetings concerning the Inter American Investment Services partnership while Coudrain was drafting articles of partnership near the time he incorporated Pangaea.

Lewis was not as closely associated with Pangaea as the other Respondents, but where a bank director, such as Lewis, is privy to information concerning a reportable item, he has a clear duty to the Bank, its shareholders and its regulators, to ensure that the information is properly and timely disclosed. Whether Lewis believed that Pangaea was for the benefit of the Bank or for the benefit of Landry, Jenson and Crabtree, he had an obligation as a Bank director to see that this material information was disclosed. Lewis did nothing to assure himself that material information concerning the potential change in control was disclosed in a timely manner to the FDIC and Bank shareholders.

In addition, Lewis did nothing to insure that his Inter American Investment Services partnership with Landry,

Jenson, and Crabtree was properly disclosed to shareholders and regulators as required by section 335.312, item 10, of the FDIC rules. Lewis reserved the corporate and trade names Inter American Investment Services and Amer Invest; he attended CLMC meetings at which the incipient firm business was discussed; he had an associate, Jana Sturgill, prepare legal memoranda. He, above all others, knew the activities on behalf of this partnership. Yet he never so much as inquired as to whether this material information was being properly disclosed to shareholders and regulators.

In the first quarter of 1992, his firm met with the Inter American Investment Services principals and drew up the articles of partnership and Lewis continued to reserve the corporate and trade names Inter American Investment Services and Amer Invest through the third quarter of 1992. Yet Lewis failed to insure that Landry and the Bank disclosed these material facts to shareholders and regulators. The material items left undisclosed were not trivial, technical or inadvertent failures to inform.

2. Unsafe and Unsound Practices

The FDI Act does not define the term "nsafe [sic] or unsound practices," nor does it specify those acts which are deemed to be either unsafe or unsound. Rather, bank regulatory agencies and courts have consistently interpreted the term as addressing any conduct which is contrary to prudent practices and which, if continued, potentially exposes a financial institution to an abnormal risk of loss or harm. *Van Dyke v. Board of Governors of the Fed. Reserve Sys.*, 876 F.2d 1377, 1380 (8th Cir. 1989),

accord, Mcorp Fin., Inc. v. Board of Governors of the Fed. Reserve Sys., 900 F.2d 852, 862 (5th Cir. 1990) ("[C]ongress has not spoken clearly to what constitutes an unsafe or unsound practice, leaving the development of the phrase to the regulatory agencies."); and *Independent Bankers Ass'n of America v. Heimann*, 613 F.2d 1164, 1169 (D.C. Cir. 1979), reh'g denied (1980) (It has long been held that bank regulatory agencies' discretion to define and eliminate unsafe and unsound practices should be liberally construed.)

There are two common components to any unsafe or unsound practice. First, an imprudent act, which is an act contrary to acceptable standards of banking operations. *First Nat'l Bank of Eden v. Department of the Treasury*, 568 F. 2d 610, 611 n. 2 (8th Cir. 1978). Second, there must be an abnormal risk of loss or damage to the financial institution. *Mcorp. Fin.*, 900 F.2d 852; *accord*: *Seidman v. OTS*, 37 F.3d 911, 932 (3d Cir. 1994). Unsafe or unsound practices need not rise to the level of having a reasonably direct effect on a bank's financial soundness to expose a bank to a risk of loss or other damage. *Greene County Bank v. FDIC*, 92 F.3d 633, 636 (8th Cir. 1996). Indeed, courts have deferred to bank regulatory agencies' expertise in defining the parameters of an unsafe or unsound" practice:

> The phrase unsafe or unsound banking practices is widely used in the regulatory statues [sic] and in the case law, and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies.

Groos Nat'l Bank v. Comptroller of the Currency, 573 F.2d 889, 897 (5th Cir. 1978).

Although unsafe and unsound practices are determined on a case-by-case basis, the Board has determined certain practices to be unsafe and unsound. Failure to follow established bank lending policies or underwriting procedures is an unsafe or unsound practice. *In the Matter of William Marvin Clark. Sr.*, FDIC-89-199e, FDIC Enforcement Decisions and Orders [Bound vol. 2], ¶ 5162, A-1609 at A-1613; *accord, In the Matter of Bay Bank & Trust Co., Panama City, Florida*, FDIC-92-313b, FDIC Decisions and Orders [Bound Vol. 2], ¶ 5213, A-2411 at A-2422. The poor management evidenced by executive officers' failure to follow or implement a bank's lending policies is an unsafe or unsound practice. *Id.* Any actions taken by a bank that is in a critical capital condition that are not clearly for the preservation of the bank's assets are unsafe and unsound. *In the Matter of Janice France, et al.*, FDIC-90-156c&b, FDIC Enforcement Decisions and Orders [Bound Vol. 2], ¶ 5166A, A-1766 at A-1766.5. A breach of one's fiduciary duty to the Bank is, *per se*, unsafe and unsound. *Stoller*, FDIC-90-115e Violations of law are contrary to generally accepted standards of prudent operation [of a financial institution] and therefore constitute unsafe and unsound practices. *In the Matter of* ***, Docket Nos. FDIC-84-192e, FDIC-84-221e, FDIC-85-40k (consolidated), FDIC Enforcement Decision and Orders [Bound Vol. 1], ¶ 5118, A-1305, at A-1317. While entering into a retainer agreement is not *per se* unsafe and unsound, the retainer agreement must be evaluated in light of the timing of the expense; the size of

the retainer, and the scope of the services actually performed. *In the Matter of Harold Hoffman Alaska Continental Bank, Anchorage, Alaska*, FDIC-88-156b&c, FDIC Enforcement Decision and Orders [Bound Vol. 2], ¶ 5140, A-1489, at A-1493.

In violation of the Bank's lending policies, Landry went before the Bank's loan review committee to champion an extraordinarily large extension of credit, $450,000, to Robert F. Smith, an out-of-territory extraordinarily uncreditworthy borrower. Landry did so at a time when he knew the Bank's senior lending officer, who had strenuously objected to the credit's extension, was out of the office. When Landry presented the loan, it received fierce opposition from the loan review committee. In light of this opposition, Landry had the loan tabled. He then saw to it that Jenson extend the credit pursuant to Jenson's personal lending authority. The loan was secured by restricted stock, a form of collateral with which the Bank had no experience, and which had limited liquidation value. At the time the loan was being underwritten, the borrower had a negative credit history and the loan officer responsible for the credit was of the opinion that its underwriting was not strong enough to support the credit's extension. In addition to these unfavorable features the Robert F. Smith loan was subject to a fee arrangement with Funding Placement Services which, in turn, had entered into a fee splitting arrangement with Landry on behalf of Pangaea. The risk of loss inherent in these practices is clear, and was confirmed by the "substandard" classification the loan to Robert F. Smith received during the 1993 examination. Under the circumstances, the loan was clearly unsafe and unsound, as was

Landry's practice of championing loans for which he was receiving fees.

In addition, Landry signed the checks and paid Bank funds to retain Dakin & Willison, William White Bolles, Richard Crabtree, Funding Placement Services, and Blue Rose in furtherance of his efforts to find capital for his personal acquisition of the Bank. As documented throughout his letter, Landry knew that the agreements entered into, retainers paid, and agreements for future remuneration were of no benefit to the Bank. The agreements and payments were made at a time that the Bank's capital was all but exhausted. The size of the payments varied,[9] and, when coupled with their sheer volume, they nearly depleted the Bank's remaining capital. Landry was well aware that the Bank was barely surviving and that the FDIC had recommended that the Bank's deposit insurance be terminated. Rather than preserve the Bank's few remaining assets, Landry chose to dissipate them in furtherance of his personal takeover of the Bank. Under the analysis set out in *Hoffman*, Landry's actions entering into and making payments on contracts, retainer agreements, and finders fees and the loss to the Bank inherent in such payments renders the practice were unsafe and unsound.

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[9] William White Bolles, $15,000 per month; Richard Crabtree $6,000 plus 10 percent of the trust department's earnings from his efforts for the next 10 years; Dakin & Willison $5,000 per month plus expenses; and Funding Placement Services, fees ranging from $15,000 for the introduction to Blue Rose to $20,000 for Pangaea's preferred stock offering.

Further unsafe and unsound practices can be found in the extensions of credit that so naturally followed the initiation of a retainer agreement, finder's fee, or trust/escrow arrangement. By extending credit to these persons with whom Jenson and Landry had contracted with to raise funds for Pangaea's takeover of the Bank, they were placing the Bank's scarce, remaining capital in the hands of persons deemed uncreditworthy by the loan department.[10] The risk of loss to the Bank is documented by the "substandard" through "loss" classifications these loans received during the 1993 Examination.

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[10] At the time $13,000 in credit was extended to Funding Placement Service's Robert G. Smith, the loan officer was unable to establish which of two social security numbers was, in fact, Mr. Smith's. The loan officer hired a detective who was unable to correlate Mr. Smith's business address with an existing address.

At the time $44,000 was extended William White Bolles, the Bank had received a letter from Mr. Bolles indicating that he was subject to a $26 million RICO judgement.

As noted in the Landry Letter, George Russell had a longstanding bad credit history with the Bank. As further noted in the Landry Letter, Byford Beasley traveled to Ecuador with Pangaea principals to seek funding for Place Vendome, Patrician, and other related ventures; yet Respondent Landry did nothing to impede the Bank's $450,000 extension of credit to GABL Corporation, a corporate interest of both Beasley and Russell.

Though not a consultant to the Bank, the $450,000 loan to Robert F. Smith was made pursuant to a fee-splitting arrangement signed by Respondent Landry, on behalf of Pangaea, and Robert G. Smith, on behalf of Funding Placement Services.

Additionally, Landry repeatedly placed his pursuit of personal gain ahead of his duty to the Bank, its shareholders, and depositors. It was his obligation to disclose material facts to disinterested directors of the Bank, shareholders and bank regulators, but he made no effort to disclose the true facts of two entities: Pangaea and Inter American Investment Services. Either one of these might have caused the Board, a shareholder or a regulator to question Respondent's abilities to discharge their fiduciary duties to the Bank. This failure led directly to the Board of Directors inability to detect the fees, contracts, loans and expenses which were being incurred on behalf of Pangaea and Inter American Investment Services and exposed the Bank to loss or other damage.

In addition to Landry's unsafe and unsound squandering of Bank assets, he and Lewis engaged in the unsafe and unsound practice of breaching other fiduciary duties to the Bank. As detailed in sections above, Landry and Lewis repeatedly breached their fiduciary duties of loyalty and care to the Bank. As a director, Lewis had a fiduciary duty to inquire and investigate. Lewis did not attend the August 8, 1991, meeting of the bank's Board of Directors. The next week, knowing nothing of the August 8, 1991, board meeting, Lewis was contacted by Jenson and asked to reserve the corporate name Pangaea in various states. Without further inquiry, on August 22, 1991, Lewis began taking steps to reserve the corporate name. Lewis attended the executive committee meeting of August 26, 1991, and the executive and Board of Directors meetings in September 1991. At no time did the Bank's Board of Directors pass a resolution authorizing the incorporation Pangaea, the incorporation of a holding

company or any legal or corporate activity that would have authorized or ratified Lewis' actions of August 22, 1991. Nonetheless, Lewis did nothing to ensure that the legal representation he undertook when he investigated and reserved the corporate name was authorized by his client, the Bank. Lewis was aware of the legal activities on behalf of Pangaea in August 1991. This sort of *ultra vires* action is precisely contrary to generally accepted standards of prudent operation of a bank and, therefore, constitute unsafe and unsound practices.

Lewis' obligation as a director was to inquire and investigate. His imprudence in carrying out his roles as the Bank's attorney and director is an unsafe or unsound practice meeting the classic definition – conduct contrary to prudent action which, if continued, potentially exposes a financial institution to an abnormal risk of loss. The loss to which these unsafe and unsound practices exposed the Bank are documented by the Landry Letter, and the cost of the contracts, fees, agreements and travel expenses emanating from Pangaea, and are directly attributable to his inattention to directoral responsibilities.

While the Respondents have denied their culpability for these actions, they have not disputed that the activities took place, and that they participated in, or chose to ignore them. The Respondents activity and inactivity constitutes unsafe and unsound practices within the meaning of section 8(e)(1)(A)(iii) of the FDI Act, 12 U.S.C.§ 1818(e)(1)(A)(iii).

c. Breaches of Fiduciary Duty

Lewis and Landry each owed the Bank fiduciary duties of loyalty and care. The facts adduced at the hearing clearly demonstrate that Lewis' and Landry's conduct constituted a breach of these fiduciary duties.

Landry argues that Louisiana law, rather than Federal law, governed any finding of breach of fiduciary duty under section 8(e) of the FDI Act. Landry also contends that he was not subject to a finding of breach in that Louisiana law requires a predicate finding of recklessness to be a fiduciary breach and that since his actions in the Bank do not rise to the level of recklessness, there can be here no finding of breached fiduciary duty. To the contrary, the undersigned considers that even if the issue of breach were subject to local rather than Federal law, Landry's actions have been so continuous, of such long standing, and particularly so presumptuous as to fall within the definition of recklessness.

Further, it is clear that fiduciary duties to a bank for the purposes of 12 U.S.C. § 1818(e), are established by Federal law. The Financial Institutions Supervisory Act ("FISA"), Pub. L. No. 89-695, 80 Stat. 1028 (1966), granted the FDIC express statutory authority to bring enforcement actions, now found in 12 U.S. [sic] § 1818(e), against directors and officers of insured state nonmember banks for breach of fiduciary duty. At the time that FISA was enacted, there was a general consensus among State and Federal courts that the fiduciary duties owed by officers and directors were those defined in such cases as *Geddes v. Anaconda Mining*, 254 U.S. 590, 599 (1921); and *Briggs*, 141 U.S. at 132. *See*, e.g., *Neese v. Brown*, 405 S.W.2d 577,

581 (Tenn. 1964) ("From our very thorough study of the matter we have concluded that there is no appreciable conflict of opinion among the courts as to the liability of directors[.] . . . [T]he test as to whether or not a director is liable depends upon whether he has used reasonable care and diligence in carrying out his duties." (citing, *inter alia*, *Briggs*, 141 U.S. at 132); *accord*, *Graham v. Allis-Chalmers Mfg.*, 188 A.2d 125, 130 (Del. 1963).

Absent any evidence that Congress intended otherwise, the statutory term "fiduciary duty" should be construed in accordance with that general understanding. *See*, *Field v. Mans*, 116 S. Ct. 437, 443 (1995) ("It is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning to these terms.' "); *see also id.* at 443 n.9 ("We construe the [statutory] terms . . . to incorporate the general common law . . . , the dominant consensus of common-law jurisdictions, rather than the law of any particular State"). Because there is not the slightest indication that Congress intended fiduciary duty to mean anything other than the common-law *consensus prevailing* when the term was added to the statute, there is no basis for construing that term in accordance with the present day law of any particular state.

For purposes of 12 U.S. [sic] § 1818 (e), fiduciary duty incorporates a traditional standard that has long been applied:

> It is now hornbook law that directors and officers of a bank have a fiduciary duty to the bank. Generally, the duty requires that bank officials,

> such as the Chairman of the Board * * * , act as prudent and diligent persons would act safeguarding the bank's property, complying with state and federal banking laws and regulations, and ensuring that the bank is operated properly. The duty is owed to the bank, and not to persons with controlling interests in the bank. It requires the proper supervision of subordinates, a knowledge of state and federal banking laws, and the constant concern for the safety and soundness of the bank. While the standard of care for bank directors and officers, like the standard of care in negligence cases, is expressed in constant terms, the nature of the duty varies according to the facts. The greater the authority of the director or officer, the broader the range of his duty; the more complex the transaction, the greater the duty to investigate, verify, clarify, and explain.

In the Matter of ***, FDIC-85-356e, FDIC-Enforcement Decisions and Orders [Bound Vol. 1], ¶ 5112, A-1229 at A-1235. (Citations omitted.)

Directors, officers, and institution-affiliated parties of a Bank owe it duties of care and loyalty. These duties require that the directors and officers exercise a degree of vigilance or care, which turns on the officer or director's fairness in dealing with the bank. *Brickner v. FDIC*, 747 F.2d 1199 (8th Cir 1984).

In all cases, an officer or director's personal or business interests must not be allowed to influence decisions made or actions taken in their official capacity with the bank. The FDIC Policy "Statement Concerning the Responsibilities of Bank Directors and Officers," 2 *FDIC*

Law Regulations, Related Acts at 5369 (April 30, 1993) states:

> The duty of loyalty requires directors and officers to administer the affairs of the bank with candor, personal honesty and integrity. They are prohibited from advancing their own personal or business interests, or those of others, at the expense of the bank.
>
> The duty of care requires directors and officers to act as prudent and diligent business persons in conducting the affairs of the bank.

The conversion of bank funds to one's own use and benefit has long been held to be a breach of a director's or officer's duty of loyalty to a financial institution. In *Stoller*, FDIC-90-115e, FDIC Enforcement Decisions and Orders [Bound Vol. 2], ¶ 5174, A-1866, the Board stated "[W]hen directors and officers place their personal interests above those of the corporation, or utilize corporate resources for personal gain, they have committed a serious breach of their fiduciary duty." *Id.* at A-1870; *accord, Pepper v. Litton*, 308 U.S. 295, 311 (1939).

Membership on a bank's Board of Directors is not a passive activity. It requires vigilance and attention to the information at one's disposal. The failure to inquire, investigate, verify, clarify and explain is a breach of an officer or director's duty of loyalty. In *In the Matter of R. Wayne Lowe and Jimmy A. Spivey*, FDIC-89-21k, FDIC Enforcement Decisions and Orders [Bound Vol. 2], ¶ 5153, A-1531 at A-1536, the Board stated:

> In the Board's view, the fiduciary duty of loyalty which bank directors owe their institution

> requires a bank director to investigate the possibility of a conflict of interest and be completely candid with his colleagues. When a bank director finds himself in a situation involving a conflict of interest, as here, it is incumbent on him to make complete disclosure in order to affirmatively avoid a conflict, even if such disclosure seems superfluous.

Additionally, in *In the Matter of Ronald J. Grubb, Bank of Hydro, Hydro, Oklahoma*, FDIC-88-282k and FDIC 89-111e, FDIC Enforcement Decisions and Orders [Bound Vol. 2], ¶ 5181, A-2006, at A-2031, the Board reviewed Grubb's actions, stating:

> Second, he proposed and personally benefited from transactions in which his personal interests and the Bank's interests were in conflict. The Board has held such conduct to constitute a breach of an officer's or director's fiduciary duty. (Citations omitted.)

Still another case held that:

> Although the creation of a conflict of interest is not *per se* a breach of fiduciary duty, the methods by which a director or officer handles a conflict of interest can dictate whether or not there has been a breach of fiduciary duty.

In the Matter of * * * *and* * * * , * * * *Bank*, FDIC-87-61e and FDIC-8762k, FDIC Adjudicated Decisions [Bound Vol. 1], ¶ 5113, A-1236 at A-1243-A-1244.

When we come to the issue of whether a failure to act may also constitute breaches of fiduciary duty, we find that a director or officer is does [sic] not escape his fiduciary duties by ignoring them or abdicating responsibility for the oversight responsibilities he was

entrusted. In *In the Matter of Patrick G. Hack, Bank of Southern Oregon, Medford, Oregon*, FDIC 91-086jj, FDIC Enforcement Decisions and Orders [Bound Vol. 2], ¶ 5168A, A-1807, the FDIC Board stated that it:

> [I]s not willing to burden the Bank and the public with the additional risk of a director who does not exercise careful, independent judgment in carrying out his fiduciary obligations and who is, at best, cavalier about the institution's federal and state regulatory obligations.

Id. at A-1808.1. These sentiments are the very ones set out by the U.S. Supreme Court:

> [W]e hold that directors must exercise ordinary care and prudence in the administration of the affairs of a bank, and that is something more than officiating as figureheads. They are entitled under the law to commit the banking business, as defined, to their duly-authorized officers, but this does not absolve them from the duty of reasonable supervision, nor ought they be permitted to be shielded from liability because of want of knowledge of wrong-doing, if that ignorance is the result of gross inattention.

Briggs, 141 U.S. at 165-166.

Senior executive officers are subject to a proportionally higher standard of care by virtue of their unique positions of trust and familiarity with the bank's operations. *In the Matter of Steven E. Smith, Mainland Bank, Texas City, Texas*, FDIC-90-159jj, FDIC Enforcement Decisions and Orders [Bound Vol. 2], ¶ 5163, A1635. Similarly, the fiduciary duties owed by attorneys representing insured

institutions are high: "An attorney representing a financial institution, like the institution's directors and officers, occupies a position of trust and has important fiduciary obligations to the financial institution." *Stoller*, FDIC-90-115e, FDIC Enforcement Decisions and Orders [Bound Vol. 2], ¶ 5184 at A-2085. (Citation omitted.)

Landry does not deny that he breached his fiduciary duties of loyalty and care to the Bank. To the contrary, he has freely admitted in writing that he placed his personal interest in acquiring the Bank ahead of his duty to seek the capital the Bank so critically needed. (Lewis Tr. 1693-1697; FDIC Exh. 119, FDIC Exh. 120, FDIC Exh. 121, FDIC Exh. 181(a), pgs. 196-199; FDIC 181(c), pgs. 67-69.) The record in this case is replete with instances in which Landry breached his fiduciary duty of loyalty to the Bank by engaging in self-dealing and creating situations fraught with conflicts of interest. Landry's Letter is a chronicle of agreements, expenses, and fees which he knew were of no benefit to the Bank, but which he paid in furtherance of his interest in acquiring control of the Bank through Pangaea. (FDIC Exh. 121; FDIC Exh. 119.) From the moment he departed for Vancouver B.C., through September 1992, all of Landry's capital raising efforts were driven by his roles as a partner in Inter American Investment Services and a Pangaea principal. His final letter of resignation from the Bank, FDIC Exh. 119, seeks neither to disclaim nor excuse his conduct.

In January of 1992, Landry paid Funding Placement Services $20,000 for a preferred stock offering for Pangaea. Landry also arranged for a loan of $13,000 to Funding Placement Services principal, Robert G. Smith, a highly uncreditworthhy [sic] borrower, to purchase a

used Porsche. Nor was Landry concerned about breaching his fiduciary duty of loyalty in May 1995, when on behalf of Pangaea, he signed a fee splitting arrangement with Funding Placement Services. The direct result of the fee splitting agreement was Landry's further breach of his fiduciary duties of care and loyalty by insisting that the Bank extend a half-million dollar credit, to an out-of-territory borrower with a weak credit history in contravention of the Bank's loan policy.

In May 1992, Funding Placement Services and Place Vendome entered into a relationship for letters of credit for Place Vendome or Patrician Corp. In order to facilitate the relationship between Place Vendome and Funding Placement Services, and in violation of his fiduciary duties of loyalty and care to the Bank, Landry agreed to arrange transfers for Place Vendome through the Bank. Landry did so at a time when: Place Vendome did not have an account at the Bank; the Bank did not have a trust agreement with Place Vendome; Landry had been warned about Securities and Exchange Commission actions pending against Place Vendome; and the Bank was not receiving any fees for the wire transfers it was making on Place Vendome's behalf.

As a further breach of his duty of loyalty, Landry, his Pangaea associates and friends, converted Bank funds to their own benefit by using Bank personnel and Bank money to travel on Bank time to Quito, Ecuador, Vancouver, B.C., and elsewhere in their quest for capital to finance their planned personal takeover of the Bank. This breach of loyalty and improper use of Bank funds was at a time when the Bank had 1 percent capital, and was required to save every penny possible to survive.

Although he saw no Bank benefit in its contract with William White Bolles, Landry breached his fiduciary duty to the Bank by making contract payments to Bolles of $15,000 monthly from July through September 1992, while he did not see any benefit to the Bank involved. Landry raised no objection to extending Bolles $48,000 in credit, which along with accrued interest of $8,000 was later written off by the Bank, even where the debtor's letter revealed that he was subject to a judgement of $26,000,000 on a RICO judgement.

Similarly, Landry could find no benefit in the Bank's contract with Crabtree's father, Richard Crabtree, but he participated in the contract and made the $6,000 payment required by it from Bank funds.

To reprise, Landry failed to disclose to the Bank's Directors any of his activities on his own and Pangaea's behalf or those of Jenson, Crabtree and Lewis at a time he was required to do so. He attended all the meetings of the Board of Directors and the executive committee. (FDIC Exh.s 61, 63, 72, 73, 76, 80, 82, 83, 85, 86, 87, 89.) He gave monthly financial reports to the board, but never disclosed that the Bank funds he was disbursing were for his own and Pangaea's and American Investment Services' interests.

As for Lewis, he similarly failed to live up to the duty of loyalty imposed upon bank directors. Lewis did not attend the August 8, 1991 meeting of the Bank's Board of Directors, but one week later, having never heard of Pangaea, Lewis was told of the federal express mailing of the 25 packages containing of the Pangaea Booklet, a King Cake, and a letter of introduction to persons in

Vancouver B.C. Lewis saw the Pangaea Booklet, but did not read it and did not inquire as to whether the mailing had been discussed or authorized at the Board of Directors meeting.

The next week, while Landry, Jenson and Crabtree were in Canada, Lewis contacted various states in order to reserve the corporate name Pangaea. In violation of his fiduciary duties of care and loyalty, he undertook to reserve the name without an inquiry as to whether it was authorized by the Bank's Directors. As a member of the Bank's Board of Directors and chairman of virtually every board committee, and as secretary to the Bank's Board of Directors who executed the minutes of each Board meeting, Lewis knew or had reason to know that the board had not authorized the formation of a corporation, or a bank holding company, or even the reservation of a corporate name. Common sense and common curiosity should have led him to disclose this to the board and to make inquiry. Yet, Lewis reserved the name from August 1991 to February 26, 1992 without informing the board of his actions or seeking proper corporate approval for them. (FDIC Exh.s 61, 63, 72, 73, 76, 80, 82, 83, 85, 86, 87, 89.) Further, he sat through an executive committee meeting on the 26th of August, during which he thumbed through the Pangaea Booklet enough to verify that the diagram on page 29 of the Pangaea Booklet indicating that the incorporators of the corporation were to own seventy percent of the stock in Pangaea without investment, and that Pangaea would own eighty percent of the Bank. Had Lewis ever either disclosed his reservation of the name Pangaea to the Bank's Board of Directors, or sought the board's authority for his representation, the

board would have learned of Landry, Jenson, and Crabtree's self-dealing. As one of the two individuals who were required to approve each expense voucher, Lewis certainly was aware that the amounts being expended were greatly in excess of the $20,000 cap suggested and accepted by the Board of Directors when the plan was first approved, but he never raised the issue.

In October 1991, Lewis took actions to facilitate the CLMC partnership with Landry, Jenson, and Crabtree to use the Bank's dormant trust department for personal gain through Pangaea. He wrote the Louisiana Secretary of State and billed the Bank for his out-of-pocket expenses for the reservation of the names Inter American Investment Services, and Amer Invest, Inc. Lewis continued to reserve these names on their collective behalf through September 1992. He had his associate research the law concerning the changes in immigration law.

His alleged, attempted disclosure of the Inter American Investment Services to the Bank's Board of Directors on November 14, 1991 was so ineffectual that no two attendees have a consistent explanation as to what was disclosed. In fact, some of the meeting's attendees were under the impression that the CLMC firm was going to aid the Bank, and not the partnership or the immigrants, in drafting legal documents. In addition, Lewis made no effort at the November 14, 1991, Bank board meeting, to disclose the fact that Landry, Jenson and Crabtree would be equal members of the partnership. As Lewis himself admits, he did not disclose the potential conflicts inherent in having two-thirds of the Bank board's trust committee, Lewis and Jenson, and the Bank's "trustee", Landry, enter into a partnership, which planned to use and profit from

the services of the trust department. Similarly, Lewis made no attempt to avoid the conflict of interest inherent in his role as chairman of the trust committee and having CLMC clients use the Bank's dormant trust department in furtherance of the Inter American Investment Services partnership, and yet he and Jenson recused themselves on a vote to approve a form of trust agreement involved.[11]

Lewis further breached his duty of loyalty to the Bank by failing to ascertain how Landry, Jenson, and Crabtree were going to perform their portion of the Inter American Investment Services work without neglecting their work at the Bank. (Lewis Tr. 1445-1448.) To fail to inquire about this matter, and fail to take an active role in insuring that the Bank was not harmed in any way by the time and effort expended by activities on behalf of the partnership by Landry, Jenson and Crabtree constitutes another breach of his duty of loyalty and care.

Lewis generally attended Bank board meetings and signed the minutes for each as secretary to the Bank's

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[11] Respondent Lewis professed that there were no conflicts between his work as the Bank's attorney, a Bank director, and chairman of the Bank's trust committee and his roles as the attorney to a foreign national with a $1,000,000 deposit in the Bank's trust department and a partner in this venture with other Bank insiders. It is difficult to imagine an arrangement more fraught with conflict, or for that matter with such little chance of success where as Lewis was well aware, the FDIC had already recommended termination of the Bank's deposit insurance and Inter American Investment Services was supposed to be engaged in raising immediate money for capital infusion by soliciting $1,000,000 deposits for the Bank's trust department.

Board of Directors. He had an affirmative duty as a fiduciary of the Bank to ensure the payments made by the Bank were for Bank business. Yet, he authorized the payment of travel vouchers for work concerning all sorts of transactions without any knowledge of why the Bank was paying these expenses.

Probably the linchpin of the case against Lewis as an errant Director is that he did not recognize that being a Bank director is a responsibility, and not a sinecure. It requires vigilant stewardship of the Bank; and an understanding of the limits of conflicting interests. Lewis was well aware of the Bank's financial condition. Yet he never thought to inquire why the two most senior Bank employees, Landry and Jenson, were traveling to Quito, Ecuador, for a week with non-Bank employees. Lewis' claim that he "thought" that the trip was for the Bank does not excuse him from failing to solve [sic] him of his failure to make inquiry and to exercise care on behalf of the Bank.[12] As the total of costs for far flung schemes mounted up, considering the financial condition of the Bank any conscientious Director would have begun to question bills presented.

The cumulative effect of Lewis' breaches of fiduciary duty – his inattention; his failure to inquire; the CLMC firm's engaging in partnership with Landry, Jenson and Crabtree; and his intentional blindness to information he

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[12] The Bank is a small community Bank in Hammond, Louisiana. For such an institution to travel to South America in search of Bank capital is highly unusual to say the least. This, in tandem with the trip's $20,000 cost, should have caused Respondent Lewis to ask questions.

had at his disposal – created the environment which allowed Landry, Jenson, and Crabtree to continue their attempts to exploit their conflicting interests.

In addition to his breaches of fiduciary duty as a member of the Bank's Board of Directors, Lewis breached his fiduciary duties of loyalty and care to his client[13], the Bank. Lewis' failure to provide full disclosure concerning the role he and his law firm would play as a full equity partner in the Inter American Investment Services and the manner in which he did not question the proposed use of the Bank's inactive trust department without further study by the Bank's disinterested board members, all acted disparately as well as jointly as breaches of his fiduciary obligations of candor, loyalty and care. As held by the Fifth Circuit in *Davis v. Parker*, 58 F.3d 183 (5th Cir. 1995), an attorney who enters into a business relationship with a client has a fiduciary duty to either disclose the relevant information to the client or advise the client to seek outside counsel before completing the transaction. The failure to disclose such potential conflicts to a client may constitute a breach of fiduciary duty by an attorney if an attorney/client relationship exists, regardless of whether the attorney entered the particular transaction as a businessman. *Id.* at 190, citing, *Louisiana Bar Ass'n v. Aiker*, 530 So. 2d, 1138, 1139 n.2 (La. 1988). Furthermore, he and his firm undertook to simultaneously to represent the Bank, to make filings on behalf of, and ultimately

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[13] Respondent Lewis' duties as the Bank's attorney, and his breaches thereof are more thoroughly discussed in the Statutory violation discussion of his violations of the Louisiana Code of Professional Responsibility, *Id.*

incorporate Pangaea, Inc. for the benefit of Landry, Jenson and Crabtree, and to provide "sweat equity legal services" for the Inter American Investment services Partnership and presumably share in the fee splitting with the Bank. This conglomeration of legal representations and roles created a host of confusing and conflicting duties which Lewis failed to fully disclose or adequately discharge in favor of his longstanding client, the Bank.

In summary, Landry and Lewis had longstanding relationships with the Bank, its directors, and officers. Landry had worked for the Bank for more than 10 years and, although not an official board member, attended all the board meetings, including its executive sessions. Lewis had been active in the Bank's affairs for years, through bad times and worse times, and even served as Director without compensation. He had been the Bank's attorney for 6 years, and was the chairman of nearly every committee of its Board of Directors. Within the board itself, no one held more positions of trust and responsibility than Lewis. Lewis and Landry were considered trusted senior advisors to the Bank's Board of Directors. As such, they each had a special duty of care and loyalty, which they breached.

C. EFFECTS OF THE MISCONDUCT

1. Financial Gain to the Respondents

As a direct result of his actions, Landry was personally and unjustly enriched. He received payment for travel and expenses he incurred for travel to Vancouver, British Columbia, Quito, Ecuador, and other places to

seek capital not for the Bank, but for Pangaea, Inc. in order to gain shared control over the Bank. Additionally, Landry entered into a fee-splitting arrangement with Funding Placement Services to split the fees generated by finding capital for, and the placement of restricted stock. (FDIC Exh. 121, pgs 6-7.) Landry then championed a half-million dollar extension of credit to Robert F. Smith, who himself had entered into an agreement with Funding Placement Services and was securing the credit with restricted stock. (FDIC Exh. 121, pgs 6-7; FDIC Exh. 4, pg. 2-a-10.) Landry's clear intent throughout the August 1991-September 1992 time frame was to have the Bank finance his acquisition of shared control of the Bank through Pangaea. At the hearing, the expenses directly attributable to Landry's conduct were tallied at $278,000 in expenses and $174,900 in loan writeoffs. (Landry Exh. 160.) All this was in addition to the salaries and benefits Landry was being paid by the Bank to supposedly recapitalize it.

As stated in *Drobbin v. Nicolet Instrument Corp.*, 631 F. Supp. 860 (S.D.N.Y. 1986):

> Such are the subtleties of human relationships that self-dealing and conflicts of interest may take many forms. The conflict of interest of a director may arise out of one's personal business interests or one's directorship in another corporation; it may also stem from a *desire to favor friends, relatives or business associates.*

(Emphasis added.) At the same time, "The statute does not require either a finding of intent to gain or that the gain be substantial – merely evidence of financial gain."

In the Matter of ***, FDIC-87-61e, FDIC Decisions and Orders [Bound vol. 1], ¶ 5113 at 1244.

Lewis' failure to disclose the Pangaea and Inter American Investment Services resulted in gain to Lewis and the CLMC firm. While in Vancouver, British Columbia, Landry, Jenson and Crabtree met with persons familiar with the change in Canadian immigration laws. (FDIC Exh. 121, pgs. 1-2.) Lewis and the entire CLMC firm benefitted from what Landry, Jenson and Crabtree learned during these meetings. In addition, Lewis and the CLMC firm benefitted from their projected use of the Bank, its trust department and Bank employees' work on Inter American Investment Services. Lewis' law firm was paid by the Bank for its incorporation of Pangaea, Inc. and for the reservation of the corporate and trade names Amer Invest and Inter American Investment Services. Although he now argues that the billings were inadvertent clerical errors, however, the CLMC firm did not reimburse the funds to the Bank until May 1994. Indeed, the Bank has never been reimbursed the entire amount. Of more importance, the law firm could expect to retain their largest client if they cooperated in the plans for reorganization under Pangaea.

Both Landry and Lewis sought and obtained personal financial benefit from their relationship with the Bank, either through Pangaea or the Inter American Investment Services partnership within the meaning of 8(e)(1)(B) of the FDIC Act, 12 U.S.C. § 1818(e)(1)(B).

2. Financial Loss to the Bank

The FDIC has long held one need only demonstrate a nexus between the violations of law, breaches of fiduciary duty, or unsafe or unsound practices and the losses or merely probable losses to the bank to meet the statutory causation requirement of section (e)(1)(B). Thus, the probability of loss, rather than actual loss, meets the statutory causation requirement. *In the Matter of* ***, FDIC-84-207e, FDIC Enforcement Decisions and Orders [Bound Volume 1], ¶ 5048, A-476 at A-583.

In *Cousin v. Office of Thrift Supervision*, 73 F.3d 1242 (2d Cir. 1996), the Second Circuit reviewed *Seidman*, 37 F.3d at 911, which held that the effects prong of section 8(e), 12 U.S.C. § 1818(e)(1)(B), required a demonstrable direct or adverse effect on the financial institution. In rejecting this standard the Second Circuit stated that:

> The plain language of the statute makes clear that the [deciding official's] interpretation is proper . . . requires that the interests of [the Banks] savings account holders could be seriously prejudiced by reason of such violation. . . . In light of this language, it would be irrational to require actual and immediate prejudice before a prohibition order may issue [emphasis in original] [citation omitted] . . . The [deciding official] need only show sufficient evidence on the record to demonstrate the possibility of serious prejudice resulting from Cousin's illegal activities for the effects prong to be met.

Id. at 1252 [emphasis added] [citation omitted]; *accord*, *Greene County Bank*, 92 F.3d at 636.

In this case, Landry authorized and Lewis approved Bank payment for contracts with Dakin & Willison, Funding Placement Services, William White Bolles, Richard Crabtree, and a host of others, which Lewis never questioned and Landry acknowledges were never intended to have, and indeed had no benefit for the Bank. (FDIC Exs. 121, 119, and 120.) Additionally, Landry billed and accepted and Lewis approved reimbursement from the Bank for travel to Vancouver, British Columbia, Quito, Ecuador, and other locations, which were intended to raise money for the ultimate seizure of control of the Bank through Pangaea, not for the Bank's recapitalization. Landry permitted, and Lewis approved non-Bank personnel Byford Beasley, Kelly Nix, and Kelly Nix' girlfriend's travel to Ecuador on Bank funds. (FDIC Exh. 121, pgs 9-10.) He endorsed a $450,000 extension of credit to Robert F. Smith, for which he was to split fees with Funding Placement Services, in which Lewis, through his law firm, would share. Though Lewis may not have known of the true purpose of these expenses, he had a fiduciary duty to question their propriety before approving payment, and his failure to do so were unsafe and unsound practices.

In his capacity as trustee/escrow agent for Place Vendome, Landry initiated voluminous wire transfers. The Bank usually charged customers $10 to $15 for each wire transfer, yet Landry provided this service free to Place Vendome. (P.F.F. 156, 157, 158.) Indeed, he engaged in wire transfers on behalf of Place Vendome despite warnings that such action would be in violation of an SEC order. In addition to the fact that the Bank never received its fees for the wire transfers, the Bank was sued

by Place Vendome's receiver in bankruptcy. The Bank incurred legal fees to defend its actions and, ultimately, paid $60, 000 to Place Vendome's receiver in bankruptcy.

As detailed at the hearing, the Bank incurred more than $400,000 in expenses paying for the advice, services, travel, contracts, out-of-territory loans, and other arrangements set in motion by or acquiesced to by Landry. (Landry Exh. 160.) Payment of these amounts by the Bank, except for the charge-off of loans, was approved by Lewis.

Either Lewis knew about Landry, Jenson, and Crabtree's misdeeds at the Bank or he did not. If he did, his liability for the expenses incurred by Landry, Jenson, and Crabtree is clear. If he did not, his ignoring his duty to inquire about the necessity for reserving. or ceasing to reserve the name Pangaea, and his responsibility for verifying the expenses on travel vouchers, fostered a climate within the Bank wherein Landry and Jenson knew that they could hire and pay consultants, incur fees and expenses, and never be questioned or confronted. Lewis abdicated his fiduciary responsibilities at a time that the Bank had no capital margin. Clearly, this is a situation which presents the possibility of serious prejudice to the Bank's depositors.

Lewis' failure to disclose and discuss his activities on behalf of Pangaea and Inter American Investment Services with the Bank's Board of Directors is the direct cause of the loss to the Bank and the years of lawsuits which have ensued. As Chairwoman of the Board Cefalu testified, the board never contemplated Pangaea's incorporation. Had Lewis simply disclosed his activities, the

contracts and fee splitting arrangements would not have been entered into, the trips would not have been taken, and the $400,000 would not have been expended. The FDIC need not demonstrate actual, immediate loss in order to demonstrate that Lewis actions caused loss to the Bank, but have done so. *Cousin*, 73 F.3d 1242.

Here, it is clear that Lewis' breach of his duty of inquiry and the unsafe and unsound manner in which he approached his duties to the Bank resulted in loss to the Bank and prejudiced the Bank's depositors. Such expenditures clearly present the possibility of serious prejudice in the best capitalized institutions. In an institution such as the Bank, with 1.04 percent capital and the threat of termination of deposit insurance looming, the conduct of Landry and Lewis in charging these expenses to the Bank it is clear that these expenditures constitute financial loss or other damage within the meaning of the "effects" element of section 8(e)(1)(B) of the FDI Act.

V. CULPABILITY

It is required by 12 U.S.C. § 1818(e)(1)(C), that a showing of "culpability" be proven, that the misconduct at issue involve personal dishonesty or, in the alternative, that willful or continuing disregard for the safety or soundness of the financial institution involved be demonstrated.

A. Personal Dishonesty

Acts or practices which rise to the level of personal dishonesty are not specified in section 8(e) of the FDI Act.

Nor do the FDIC administrative decisions define or explain what actions would be considered requisite for a finding of personal dishonesty. Rather, the administrative decisions have assumed or inferred personal dishonesty from facts of or actions chronicled in a particular proceeding. *In the Matter of Frank Jamison, First State Bank Liberty, Texas,* FDIC Enforcement Decisions and Orders [Bound Vol. 2], ¶ 5154A, A-1541; and *In the Matter of Thomas K. Benshop, The Colorado State Bank of Walsh, Walsh, Colorado,* FDIC Enforcement Decisions and Orders [Bound Vol. 2], ¶ 5192, A-2151. However, financial institutions' case law suggests that personal dishonesty is a broad standard, from acting in a fraudulent manner or with deliberate deception by pretense or stealth encompassing everything, to acting in a manner that fails to adhere to a standard of integrity.[2] The Board of Governors of the Federal Reserve has held, and the Eighth Circuit adopted the position, that in the context of a section 8(e) proceeding:

> [W]hile personal dishonesty (which is not defined in the statute) must be evaluated on a case-by-case basis it need not amount to civil fraud and could encompass a broad range of conduct. According to the Board, this conduct may include: a disposition to lie, cheat[,]

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[2] *See In the Matter of* * * *, The* * * * *National Bank of* * * *,* 1988 WL 427510 (O.C.C.) at 9, affirming and applying the less restrictive definition adopted by the Board of Governors of the Federal Reserve System and certified by the Comptroller of the Currency *In Re: Stanford C. Stoddard,* No. AA-ED-85-44 (January 29, 1988), *rev'd on other grounds; Stoddard v. Board of Governors of the Fed. Reserve Sys.,* 868 F.2d 1308 (D.C. Cir. 1989).

> defraud: untrustworthiness; lack of integrity[;] . . . misrepresentation of facts and deliberate deception by pretense and stealth[;] . . . [or] want of fairness and [straightforwardness].

Van Dyke, 876 F.2d at 1379.

In applying any of the definitions of personal dishonesty set out in *Van Dyke* to Landry's actions between August 1991 and September 15, 1992, it is clear that he was personally dishonest. Landry has repeatedly admitted his personally dishonest acts in depositions, in his letter of resignation, and in his epic Landry Letter to Examiner in Charge Cooper. (FDIC Exh. 121, FDIC Exh. 181(a), FDIC Exh. 181(c), FDIC Exh. 119, FDIC Exh. 120.)

In December 1991, Landry had the Bank enter into an agreement with Dakin & Willison which required the Bank to pay Dakin & Willison $5,000/month plus expenses. Landry concealed the contract from the Bank's Board of Directors, as well as its true purpose: facilitating his Inter American Investment Services partnership with Lewis. (FDIC Exh. 121, pg 3-4.) At that time he was aware that Jenson had signed a contract with Funding Placement Services requiring the Bank to pay Funding Placement Services $20,000 for their drafting a preferred stock offering document for Pangaea. (FDIC Exh. 121, pgs. 3-4, 7.)

In February 1992, Pangaea was incorporated Landry, Jenson, and Crabtree as the incorporators. From this time forward, Landry signed agreements on behalf of Pangaea and misappropriated Bank funds for Pangaea-related enterprises including contracts with William White Bolles

and Richard Crabtree, and the trip to Ecuador. Additionally, Landry exposed the Bank to potential for loss in acting as trustee for Place Vendome after he was aware that the SEC had entered an injunctive order prohibiting the transfer of funds on behalf of Place Vendome. Landry also insisted that the Bank extend $450,000 in credit to Robert F. Smith, an out-of-territory borrower unknown to the Bank, without disclosing that through Pangaea, he would be splitting fees generated by the credit's extension. Landry's personally dishonest acts on behalf of Pangaea continued unabated until September 16, 1992, the night before the Bank's ultimate purchase offered cash to recapitalize the Bank. Landry's actions from August 1991 though September 16, 1992, provide an encyclopedia of personally dishonest acts within the meaning of *Van Dyke*.

In *Greenberg v. Board of Governors of the Fed. Reserve Sys.*, 968 F.2d 164 (2d Cir. 1992), the Circuit Court examined the Greenbergs' contention that their failure to fully disclose insider transactions did not constitute personal dishonesty within the meaning of section 8(e) of the FDI Act. The Court stated:

> The Greenbergs also assert that the record does not support the Board's determination of personal dishonesty. More than substantial evidence exists to support the conclusion to the contrary. The Board found that the Greenbergs had not revealed several of the insider transactions to the directors of the bank. The record provides ample support for this conclusion. Minutes of the directors meetings are silent on the relationship between the Greenbergs and the limited partnership that received loans. *Cum*

tacet, clamant. (With apologies to Cicero, literally "With silence they shout.") The Board and the ALJ were well within their discretion in rejecting the Greenbergs' self serving testimony to the contrary.

Greenberg, 968 F.2d at 171.incriminating

At the Board of Directors meeting on November 14, 1991, at which the use of the Bank's trust department was discussed, there is an inculpating silence. Although both Landry and Lewis were at the meeting at which a request to use Bank facilities and personnel for an immigration service was discussed, they did not disclose the Inter American Investment Services partnership. They did not disclose that the CLMC firm or Landry, Jenson and Crabtree were to be equal equity partners in the enterprise. They did not disclose how Landry, Jenson and Crabtree would discharge their duties to the Bank while representing clients with funds in the Bank's trust department. The minutes' lack of specificity as to whatever disclosures were made is mirrored by the board members and recording secretary's inability to describe what role the CLMC firm would play. To the extent that the CLMC firm's role was disclosed, director Bill Hood and recording secretary Vanessa Drew believed that CLMC would to legal work for the Bank in connection with a partnership between s Jenson and Crabtree. Here, as in *Greenberg*, there is ample evidence that Lewis' failure to properly disclose his role in Inter American Investment Services to the Bank's Board of Directors is evidence of personal dishonesty.

B. Willful or Continuing Disregard

The second standard applicable to the culpability element of section 8(e) of the FDI Act is that of willful or continuing disregard for the safety or soundness of the financial institution involved. Again, this term is not defined in the FDI Act or in its legislative history. The court in *Brickner*, 747 F.2d 1198, explored the statute's use of the disjunctive and opined that willful or continuing disregard provided two distinct alternative standards for removal. *Id.* at 1202-1203. The *Brickner* court further distinguished the separate standards of willful or continuing disregard stating: "[A]lthough 'continuing disregard' may require some showing of knowledge of wrongdoing, it does not require proof of the same degree of intent as "willful disregard." *Id.* at 1203.

While case law has not fully described the "willful" component of a Respondent's disregard for an institution's safety and soundness, its import is clear when examined in light of the dictionary definition and court decisions interpreting it. *See*, e.g., Greenberg, 968 F.2d at 170-171. *Black's Law Dictionary*, 5th Edition (1979), pg. 1434, defines "willful" as "intending the result which actually comes to pass; designed; intentional; not accidental or involuntary." Within the statute, it is significant that the term "willfulness" clearly refers to the intent to perform the acts or omissions constituting the unsafe or unsound banking practices, rather than indicating a deliberate intent to harm a bank. Moreover, the extent to which "willful disregard" implies a degree of knowledge by a Respondent, it refers to knowledge of the facts in

question, not knowledge of the law or its violation. *Federal Sav. and Loan Ins. Corp. v. Geisen*, 392 F.2d 900 (7th Cir. 1968); and *Conover*, 682 F.2d at 1342.

The "willfulness" element of section 8(e) can also be imputed from the facts and circumstances of the case. Willfulness has been found in conduct which lies between simple negligence and actual knowledge so as to be "in effect intentional." *Yates v. Jones Nat'l Bank*, 206 U.S. 158 (1907); *Goodman v. Benson*, 286 F.2d 896, 900 (7th Cir. 1961) (willfulness inferred from careless disregard for responsibilities); and *Capitol Packing Co. v. United States*, 350 F.2d 67, 78-79 (10th Cir. 1965) (willfulness is an intentional misdeed or gross neglect of a known duty). Willfulness is rarely proven by direct evidence since it is a state of mind; rather, it is usually established by drawing reasonable inferences from available facts. *United States v. Wells*, 766 F.2d 12, 20 (1st Cir. 1985).

Moreover, officers and directors cannot shield themselves from liability through, pleading ignorance to matters which they have a duty to know. As stated in *White v. Thomas*, 37 F.2d 452, 454 (9th Cir. 1929), quoting *Martin v. Webb*, 110 U.S. 7 (1884):

> Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. . . . That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its

officers upon the basis of that course of business.

Martin, 110 U.S. at 15.

Refusal to examine or inquire into matters which one has a duty to know may constitute a "knowing" and intentional violation. *See Thomas v. Taylor*, 224 U.S. 73 (1912): and *FDIC v. Mason*, 115 F.2d 548 (3d Cir. 1940). Similarly, "evidencing a willingness to turn a blind eye to interests in the face of known risk" constitutes willful disregard within the meaning of section 8(e) of the FDI Act. *Cavallari v. Board of Governors of the Fed. Reserve Sys.*, 57 F.3d 137 (2d Cir. 1995).

Landry and Lewis both attended the September board meeting. Each heard the FDIC's warnings concerning the proposals submitted to the FDIC in the Bank's Capital Enhancement Plan. In willful disregard of these direct, unambiguous cautions, Landry proceeded to implement the plan for his own benefit and Lewis did nothing to impede him. Emblematic of Lewis' willful disregard was his willingness to approved payment of the funds and have the Bank proceed despite the FDIC's comments that the Capital Enhancement Plan were speculative and would not work. (Lewis Tr. 1262.)

As clearly demonstrated throughout the hearing, Lewis refused to make even the most rudimentary inquiries concerning things within his purview at the Bank. He rarely or never read board of director minutes before signing them. He did not question other board members to verify that the minutes of the meetings that he did not attend though he did sign the minutes supposedly reflected things that actually took place at the

meeting. More importantly, Lewis never inquired about the travel vouchers he was signing. He began reserving the corporate and trade names Amer Invest and Inter American Investment Service in October 1991. Sometime after October 15, 1991, he initialed a travel voucher which included costs for the "immigration fund." By his own admission, Lewis did nothing to assure himself that the expenses were not for his firm's partnership with Landry, Jenson, and Crabtree.

Lewis began reserving the name Pangaea in August 1991. At no time did he ascertain or seek to have the proper board resolutions passed to assure that his actions were on behalf of the Bank. He attended Bank board meetings and knew that the Board had not authorized a bank holding company. Yet, he proceeded to reserve the corporate name without question or concern for the Bank. Similarly, he ceased reserving the name Pangaea, without the slightest inquiry as to the reason for the cessation. Again, he utterly failed in his duty as a director to inquire as to the reason for the sudden change. On March 10, 1992, Andre Coudrain scribbled a note on Pangaea's franchise tax form asking Lewis what he, Coudrain, should do with it. Obviously, Coudrain would not have asked if he did not believe that his partner, Lewis, could provide an answer to the question. Here, as in *Thomas*, Lewis' refusal to examine or inquire into matters which one has a duty to know may constitute a "knowing" and intentional violation.

Lewis' partner, Coudrain, drafted the Inter American Investment Services partnership agreement at about the time he drafted the Pangaea articles of incorporation. Yet, Lewis utterly failed to inquire about the travel voucher of

Jenson's that he initialed in March 1992 with "immigration fund" expenses listed on it. In July 1992, Inter American Investment Services was getting into full swing, and once again, Lewis, inaction in inquiring whether the immigration fund expenses listed in Jenson's travel and expense report is manifest. Throughout this period, Lewis acted in a manner demonstrating his clear intention not to know what was going on at the Bank. He knew only what he wanted to know in order to deny the depth of his involvement with Inter American Investment Services and Pangaea. Lewis cannot escape the results of his actions by not asking the appropriate questions and living up to the responsibilities vested in him by the Bank's Board of Directors. Lewis acted in a manner intending the results of his action and of his inaction; his inaction was knowing and intentional and continued throughout the August 1991-September 1992 period.

Landry's actions at the Bank's expense, together with those of Jenson and Crabtree, were clear, deliberate, methodical acts to seize control of the Bank from the shareholders themselves. He was involved from the very beginning. He clearly intended not to tell the members of the Board of Directors what he and Jenson and Crabtree involved in. In this way, his actions were willful. They were deliberate, intentional, and lasted for more than a year. As detailed in his September 16, 1992, resignation letter to the Bank, FDIC Exh. 119, 1 which graphically proved Landry' statement to Ellaby that he clearly knew what he was doing on behalf of Pangaea. He was quite aware that it was a breach of his duty to the Bank, and he intended his actions to be breaches of duty to the Bank. Therefore, Landry's actions, just as those of Lewis, meet

the culpability standard set out in section 8(e) of the FDI Act.

VI. RULING DENYING RESPONDENTS' MOTION TO DISQUALIFY, OR IN THE ALTERNATIVE, TO DISMISS FOR LACK OF JURISDICTION

The Notice instituting this proceeding was filed on April 30, 1996. On September 12, 1997, almost a year and half later and shortly prior to the scheduled hearing, Landry filed a Motion to Disqualify Or in the Alternative, Motion To Dismiss For Lack Of Jurisdiction. Lewis filed a motion to join, which was granted at the opening of the hearing. (Tr. 11)

The motion argues that neither the Federal Deposit Insurance Corporation nor the Office of Financial Institution Adjudication ("OFIA") is vested with the authority to "appoint" the Administrative Law Judge to preside over this proceeding, so that he must be disqualified. It argues further that even if authorized to "appoint" an Administrative Law Judge, the procedure followed in this matter is a violation of the Appointments Clause of the United States Constitution, Art. II, § 2, cl.2.

A. DELAY IN RULING

Though Landry claims not to have timed this possibly dispositive motion to gain a delay in the hearing, the timing of the motion and the twenty day period for permitted for response to such a motion left only about three days to rule prior to the commencement of hearing

on October 6, 1997. In addition, this period would perforce interfere with Petitioner's trial preparation. The motion in effect seeks to have this case be heard by a member of the FDIC's Board of Directors and that such individual, who must by definition be the titular head of one of the banking agencies, forego his other duties, be selected and fully briefed for what was estimated to be a month-long hearing out of state, requiring inspection and consideration of correspondence and motions and orders accumulated for over a year of pre-hearing activity. The undersigned considers that intended or not, the motion would unquestionably interfere with the proper disposition of this matter. The use of motion practice to interfere offensively with the hearing is strongly disapproved.

On September 17, 1997, FDIC Enforcement Counsel moved for an extension of time in which agency counsel had to respond to the Disqualification Motion until the post-hearing phase of the proceeding, arguing that the applicable rules contemplate deferring the issues raised by Respondent until such time as the complete record can be reviewed by the agency. On September 22, 1997, the undersigned ruled that the hearing would not be delayed by the timing of Landry's motion nor would a response or ruling on such a potentially dispositive motion be rushed. Accordingly, the undersigned granted Enforcement Counsel's Motion for Extension of Time to answer the motion, until post-hearing briefs.

B. THE MOTION

The motion is based on the following arguments: First, that OFIA was improperly created; second, that

OFIA's Administrative Law Judges are not authorized by 12 U.S. [sic] 1818(e) to hear matters involving removal and prohibition of institution-affiliated parties; and third, that the Appointments Clause of the United States Constitution does not authorize FDIC or OFIA to assign Administrative Law Judges to preside over these enforcement actions. Each argument will be considered separately.

1. Office of Financial Institution Adjudication ("OFIA")

Prior to the enactment of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), none of the banking agencies employed their own Administrative Law Judges, but instead borrowed them on temporary assignment from other agencies on an as-needed basis in a manner which did not permit the Administrative Law Judges to build a base of expertise. By Section 916 of FIRREA, Congress mandated that the banking agencies "jointly . . . establish their own pool of Administrative Law Judges." 103 Stat. 486, 12 U.S.C. § 1818. The banking agencies therefore entered into an inter agency agreement to have one agency employ Administrative Law Judges to be jointly utilized by all the agencies as required. OFIA is the entity established by the banking agencies, of which the Office of Thrift Supervision ("OTS) was chosen and contracted with to employ the Judges and provide office space, staff, and supplies to the common pool of Administrative Law Judges. With the approval of the Office of Personnel Management, OFIA is staffed with the undersigned, one other Administrative Law Judge, two attorney advisor/law clerks, and support

staff, employed by the office of Thrift Supervision ("OTS"). Salaries and benefits are allotted to attorney advisor/law clerks and support staff on the scale applicable to all OTS employees, though salary of the Administrative Law Judges is allotted pursuant to separate statute and the requirements of the office of Personnel Management. Cases are assigned to the respective Administrative Law Judges on a rotational basis, subject to the number of cases, hearings calendared, and estimated times required for each. All the banking agencies agree on the annual budget for OFIA and share the costs, reimbursing OTS for their respective shares of time required to operate the office.

Accordingly, as mandated by Section 916 of FIRREA, the services of OFIA Administrative Law Judges are jointly available to all five federal banking agencies though employed, housed and supported by the OTS, the "host agency" with the authority to employ.

2. Authority to Hear Removal and Prohibition Cases

Respondent argues in part that although 12 U.S.C. § 1818(e) specifically contemplates an Administrative Law Judge presiding over a removal and prohibition action initiated by the office of the Comptroller of the Currency ("OCT") [sic], it is silent with respect to who shall preside over a removal and prohibition proceeding when initiated by the FDIC. Motion to Disqualify at 2.

The section specifically provides that:

> In any action brought under this section by the Comptroller of the Currency in respect to any such party with respect to a national banking association or a District depository institution, the findings and conclusions of the Administrative Law Judge shall be certified to the Board of Governors of the Federal Reserve System for the determination of whether any order shall issue.

This section simply provides that the final agency determination on prohibition and removal actions initiated by the OCT [sic] is made not by the OCT [sic], but rather by the Federal Reserve Board, the rationale for which is not here pertinent. It does not even obliquely address or affect the question of who may preside at the hearing level and issue a Recommended Decision, as Respondent suggests. The reference to the Administrative Law Judge's findings and conclusions of an OCT [sic] enforcement action cannot be construed here to preclude the participation of Administrative Law Judges presiding over other enforcement actions brought by the other federal banking agencies under 12 U.S.C. § 1813(q) (3).

Not only is Respondents' reliance on the above section misplaced, but if anything, the statement read in conjunction with the section as a whole indicates that in order to meet the requirements and aims of the Administrative Procedures Act it *must* be Administrative Law Judges who will preside over all enforcement actions brought by the banking agencies and will make findings, conclusions and recommendations. Section 8(e) authorizes the appropriate federal banking agencies, which

includes Board of Governors of the Federal Reserve System, Office of the Comptroller of the Currency, Office of Thrift Supervision and Federal Deposit Insurance Corporation (the National Credit Union Administration comes under a different statute), to issue prohibition and removal orders. The statute does not treat one banking agency any differently than the others except to direct that final agency decisions in OCT removal and prohibition actions be determined by the Federal Reserve Board. There is no basis for Respondent's assumption that the statute may have different requirements as to who may preside over an enforcement action depending on the banking agency involved. Taken together, 12 U.S.C. § 1818(e) (1) provides that the "appropriate Federal banking agency" has authority under specified circumstances to remove or prohibit from further participation in the affairs of a Federally insured depository institution, and 12 U.S.C. § 1813 (q) (3) provides under the facts here that the term "appropriate Federal banking agency" means "the Federal Deposit Insurance Corporation in the case of a State nonmember insured bank," which is precisely what the First Guaranty Bank, of Hammond, Louisiana, was at the time. In fact, by section 916 of FIRREA, the Congress specifically required promulgation, so far as possible, of Uniform Rules of Practice and Procedure, demonstrating congressional intent that administrative proceedings before all the agencies shall be substantially similar.

Respondent then asserts that since section 8(e) is silent on the issue appointment of the Administrative Law Judge, one must turn to the Administrative Procedure Act ("APA") for guidance and follow the three

prescribed options for selecting an Administrative Law Judge. Due to the misreading of the statute, the motion proceeds directly to review the APA and the three prescribed options for selecting an Administrative Law Judge under 5 U.S.C. § 556(b). This section authorizes, first, that the agency shall appoint Administrative Law Judges, secondly, that members of the body comprising the agency shall appoint its Administrative Law Judges, and third, that Administrative Law Judges are to be appointed under 5 U.S.C. § 3105, which provides in pertinent part:

> Each agency shall appoint as many Administrative Law Judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.

Under this third option, if the agency does not have any or sufficient Administrative Law Judges available, the agency may obtain them through the Office of Personnel Management with the consent of the agencies making them available. 5 U.S.C. § 3344. Respondent asserts that section 916 of FIRREA, authorizing the banking agencies to create a common pool of Administrative Law Judges to hear enforcement actions, does not expressly amend 5 U.S.C. §§ 3105 and 3344. Landry concludes that since OFIA "appointed" the undersigned to hear this matter, rather than a single agency, the "appointment" by OFIA fails to follow any of the above three options set forth in the APA.[3] However, OFIA "appointed" no one, but

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[3] Unfortunately, the undersigned utilized the improper word "appointed" in reporting that he had been *designated* by OFIA as the specific OFIA Administrative Law Judge who

merely designated which of the two-man "pool" of Judges would conduct this particular hearing and issue the Recommended Decision for final agency action.

The OTS is an agency, 12 U.S.C. § 1462a, and it employed both Administrative Law Judges after they were properly qualified by OPM. The fact that OTS made this decision collectively with the other banking agencies does not invalidate its authority make the selection and to employ.

Section 916 of FIRREA is consistent with the aims of the Administrative Procedure Act. The purpose of the creation of OFIA in part was to promote administrative expertise within a core group of Administrative Law Judges to hear enforcement matters. Also, OFIA's structure promotes the Administrative Law Judges independent judgment free from any constraint by a banking agency.

Even if the creation of OFIA and the appointment of its Administrative Law Judges were considered a departure from the traditional elements of the Administrative Procedures Act this would still not invalidate the undersigned's appointment Congress can, and does, deviate

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would hear the proceeding and issue the Recommended Decision. The "appointment" of an individual as an Administrative Law Judge is through the qualification by the Office of Personnel Management, and the employment by a specific governmental body. Both of the Administrative Law Judges employed by the OTS through OFIA had been many years previously so employed and thus appointed, and served with several other agencies and departments pursuant to those appointment.

from APA procedure. For example, in *Stone v. Immigration and Naturalization Serv.*, 514 U.S. 386, 393 (1995), Congress amended the Immigration and Nationality Act and "chose to depart from the ordinary judicial treatment of agency orders under reconsideration." The Supreme Court held in part that:

> Both the Hobbs Act and the APA are congressional enactments, and Congress may alter or modify their application in the case of particular agencies. *Id.*

Furthermore, in *Schweiker v. McClure*, 456 U.S. 188 (1982), the Supreme Court upheld a procedure established by Congress and the Secretary of Health and Human Services, under which hearing examiners appointed by private insurance carriers presided over hearings to determine eligibility for benefits under a federal program administered by the carriers on behalf of the Secretary. *See also Alliance for Community Media v. F.C.C.*, 10 F.3d 812, 816 fn 2 (D.C. Cir. 1993) ("Congress may legislatively alter or revoke its delegation of authority . . . To require an agency to justify its change in position taken at the express direction of Congress would be tantamount to subjecting the legislative decision itself to the APA."); *Castilli-Villagra v. Immigration and Naturalization Serv.*, 972 F.2d 1017, 1025 (9th Cir. 1992) (Language in the Immigration and Nationality Act specifying that its procedures were the exclusive method of deporting an alien was sufficient to depart from APA procedure.); *Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 133 (1953) ("The position of hearing examiners is not a constitutionally protected position. It is a creature of congressional enactment . . . Their positions may be regulated

completely by Congress, or Congress may delegate the exercise of its regulatory power. . . . "); and *Marcello v. Bonds*, 349 U.S. 302 (1955) (Deportation proceedings which deviated from APA procedure were upheld.)

Here, Congress unambiguously expressed its desire to have the federal banking agencies engage a "pool" of Administrative Law Judges to hear enforcement matters. Section 916 of FIRREA is specific. Whether or not this mandate constitutes a departure from APA procedure, there is ample support for doing so.

3. Appointments Clause

The motion also argues that the manner in which the undersigned was "appointed" to OFIA, violates the Appointments Clause of the United States Constitution, Art. II, § 2, cl.2. The Appointments Clause provides in pertinent part that:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United states, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior officers as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Accordingly, Congress may vest the authority to appoint inferior officers, including Administrative Law Judges, in either the President, the courts of law, or the

heads of Departments. The motion's position is that Congress has no constitutional authority to assign the power elsewhere, but the case citations in the preceding section show otherwise. Here, Respondent argues, the decision to employ the specific Administrative Law Judge hearing this case, and the specific Administrative Law Judges to staff OFIA, was made collectively by the banking agencies. Therefore, Respondent asserts that the undersigned's assignment to hear this matter is unconstitutional.

Actually, Respondent takes issue with the directives of section 916 of FIRREA which *require* the appropriate federal banking agencies and the National Credit Union Administration to both establish a pool of Administrative Law Judges and to develop a set of uniform rules and procedures for administrative hearings. Reading the two requirements together makes clear that congressional intent was to provide consistency and continuity in the banking arena. As stated above, the Appointments Clause pertains only to the appointment of officers of the United States and does not place restrictions on the creation of the entity in which the officer functions. Accordingly, the formation of OFIA within the OTS by the banking agencies collegially does not fall within the intended scope of the Appointment Clause and is therefore not governed by it.

Section 916 of FIRREA, which requires the formation of OFIA fails to use the language of "appointment". *Edmond v. United States*, 520 U.S. 651 (1997), involved the issue of whether two civilian judges of the Coast Guard Court of Criminal Appeals, an intermediate court in the military justice system, had been validly appointed. The

Court determined that a statute that failed to use the language of "appointment" did not even invoke the Appointments Clause. The Court found that pursuant to the applicable provision of that case, 49 U.S. [sic] § 323 (a), the Secretary of Transportation was authorized to appoint officers of that department, and therefore the appointments were constitutionally valid. The Court found that Article 66(a) of the Uniform Code of Military Justice, 10 USC § 866(a) did not give the Judge Advocate General of each military branch authority to appoint judges of his respective Court of Criminal Appeals. The *Edmond* Court ruled that Article 66(a) concerns not the appointment of judges, but only their assignment. 137 L.Ed 2d 923. Article 66(a) reads in applicable part:

> Each Judge Advocate General shall establish a Court of Criminal Appeals which shall be composed of one or more panels,. . . . Appellate military judges who are assigned to a Court of Criminal Appeals may be commissioned officers or civilians . . .

(Emphasis added.) The Court reasoned that there is no provision in the Article of an "appointment." Instead, the statute refers to military judges "who are assigned to a Court of Criminal Appeals." *Id.* at 926, emphasis added. The Court concluded that since the statute did not specifically use the "appointment" language, it did not intend to invoke the Appointments Clause and the statute did not require a separate appointment – merely an assignment. *Id.* 926-927. The Court refused to interpret Article 66(a) in a manner that would make it inconsistent with the Constitution. Similarly, in the instant case, the language of section 916 of FIRREA, to "establish their own

pool of Administrative Law Judges . . . ", (emphasis added) is reminiscent of the statute referenced above found by the Edmond Court to be insufficient to invoke the Appointments Clause. The undersigned, as did the Edmond Court, cannot interpret section 916 as being inconsistent with the Constitution. The Federal Deposit Insurance Corporation, in its Decision and Order involving James Leuthe, also refused to interpret section 916 as constitutionally invalid.[4] The statute directing the agencies to create the pool of Administrative Law Judges "does not run afoul of either the Administrative Procedure Act or any provision of the Constitution."[5] *See* Corrected Brief of Appellees, *James L. Leuthe v. OFIA et al.*, (Case No. 97-1826, 3rd Cir., filed February 27, 1998).

In the instant case, the two Administrative Law Judges comprising OFIA were previously employed by other federal agencies prior to employment by OTS for OFIA and thus, with OPM certification, validly appointed to their positions. Furthermore, the position of Administrative Law Judge is a creature of Congressional enactment and is not constitutionally protected and may be regulated completely by Congress. *See, Ramspeck v. Federal Trial Examiners Conference*, 345 U.S. 128, 133 (1953), reh'g den, 345 U.S. 931 (1953). For all the reasons stated above,

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[4] Decision and Order To Prohibit From Further Participation and Assessment of Civil Money Penalty dated June 26, 1998. *In the Matter of James L. Leuthe, Individually and as an Institution affiliated Party of First Lehigh Bank, Walnutport, Pennsylvania*, Docket Nos. FDIC-95-15e and FDIC-95-16k.

[5] Decision and Order at 20.

the formation of OFIA does not violate the intended purpose of the Appointments Clause.

Respondents' Motion to Disqualify Or in the Alternative, Motion to Dismiss for Lack of Jurisdiction is therefore denied.

The Respondents' post-hearing briefs raise exceptions to other evidentiary or procedural rulings by the undersigned. The rulings and Orders are contained in the record, and the undersigned finds no reason to reconsider the procedural and evidentiary rulings made and orders issued.

VI. CONCLUSIONS OF LAW

1. The Federal Deposit Insurance Corporation has jurisdiction over the federally insured depository institution, and of the institution-affiliated parties Respondent.

2. The Respondents engaged or participated in violation of law or regulation, unsafe and unsound practices, and breached their fiduciary duty.

3. By reason of the violations, practices or breaches, the insured depository institution suffered financial loss, and Respondents received financial gain o [sic] other benefit.

4. The violations, practices and breaches involved personal dishonesty, and willful or continuing disregard for the safety and soundness of the insured depository institution.

VIII. PROPOSED ORDER

It is hereby recommended that an Order be issued as to the Respondents jointly, in the general form and content as attached hereto.

/s/ Walter J. Alprin
WALTER J. ALPRIN
Administrative Law Judge
Office of Financial Institution Adjudication

PROPOSED ORDER OF REMOVAL AND PROHIBITION

FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of **MICHAEL D. LANDRY, and ALTON B. LEWIS, individually, and as institution-affiliated parties of** **FIRST GUARANTY BANK HAMMOND, LOUISIANA** **(INSURED STATE NONMEMBER BANK)**	**Docket No. FDIC-95-65e**

On April 30, 1996, pursuant to 12 U.S.C. § 1818(e) (6), the Federal Deposit Insurance Corporation issued Notice of Intention to Prohibit Michael D. Landry, and Alton

B.Lewis, from further participation in the affairs of Federally insured depository institutions.

NOW, THEREFORE, for the reasons set forth in the accompanying Decision, and based upon the record of the hearing,

IT IS HEREBY ORDERED THAT Michael D. Landry, and Alton B. Lewis, shall be and are removed from office and prohibited from further participation in the affairs of Federally insured depository institutions pursuant to 12 U.S.C § 1818(e).

This order shall become effective upon the expiration thirty days after service is made upon Respondents or their counsel, and shall remain in effect until such time as it is stayed, modified, terminated, or set aside by the Federal Deposit Insurance Corporation or a reviewing court.

Dated this ___ day of _____, 1999

_____

CERTIFICATE OF SERVICE

I hereby certify that on August 14, 1998, I caused a true copy of the above to be served on each of the following by FEDERAL EXPRESS MAIL OVERNIGHT OR MONDAY DELIVERY SERVICE, *or by hand to their office:

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/s/ Charlene Pierce
Charlene Pierce
Secretary to Judge Alprin

FILED
AUG 28 2000
CLERK

No. 99-1916 (2)

In the Supreme Court of the United States

MICHAEL D. LANDRY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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18pp

QUESTION PRESENTED

Whether the decision of the Federal Deposit Insurance Corporation, which ordered that petitioner should be removed from his position as a bank officer and prohibited from further participation in the banking industry, should be set aside on the ground that the administrative law judge who conducted a hearing and issued a recommended decision was appointed in an unconstitutional manner.

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In the Supreme Court of the United States

No. 99-1916

MICHAEL D. LANDRY, PETITIONER

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 204 F.3d 1125. The final order of the Federal Deposit Insurance Corporation (FDIC) Board of Directors (Pet. App. 40a-108a) is reported at 1 FDIC Enforcement Decisions and Orders ¶ 5256, at A-3017. The order of the FDIC Board of Directors denying petitioner's motion for stay pending review in the court of appeals is reported at 1 FDIC Enforcement Decisions and Orders ¶ 5259, at A-3053, WL 639568. The recommended decision of the Administrative Law Judge (Pet. App. 109a-222a) is reported at 1 FDIC Enforcement Decisions and Orders ¶ 5256, at A-3044.

JURISDICTION

The judgment of the court of appeals was entered on March 3, 2000. The petition for a writ of certiorari was filed on May 31, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress has authorized the Federal Deposit Insurance Corporation to remove a bank officer from his position and to prohibit him from further participation in the banking industry when his actions threaten the integrity or stability of an insured bank. 12 U.S.C. 1818(e). An officer who has been notified of the FDIC's intention to remove and prohibit him from such participation may request an administrative hearing. 12 U.S.C. 1818(e)(4). If the officer requests a hearing, the FDIC assigns the case to an administrative law judge (ALJ) from the Office of Financial Adjudications (OFIA) for a formal, on-the-record administrative hearing. 12 U.S.C. 1818(e)(4) and (h)(1); 5 U.S.C. 554, 556; 12 C.F.R. 308.103.

In 1989, Congress directed the federal banking agencies to "establish their own pool of administrative law judges" to conduct hearings. Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, § 916, 103 Stat. 486 (12 U.S.C. 1818 note). Pursuant to that authority, the banking agencies established the OFIA. Pet. App. 96a-97a, 207a. One of the federal banking agencies, the Office of Thrift Supervision (OTS)—an agency within the Department of the Treasury, see 12 U.S.C. 1462a(a)—employed two ALJs for OFIA assignment. Pet. App. 95a n.36, 96a-97a, 207a-208a. Those ALJs had previously been certified as qualified by the Office of Personnel Management. See *id.* at 211a-212a n.3, 217a.

At the conclusion of the hearing, the ALJ issues a recommended decision and refers the matter to the FDIC Board of Directors for a formal and final decision. 12 C.F.R. 308.38. The FDIC Board reviews the administrative record de novo, considers any exceptions filed by either party (the bank officer or FDIC Enforcement Counsel), and issues a final decision and order. 12 U.S.C. 1818(h)(1); 12 C.F.R. 308.39, 308.40. If the FDIC Board issues an order removing the officer and/or prohibiting him from further participation in the industry, the officer may file a petition for review "in the court of appeals of the United States for the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit." 12 U.S.C. 1818(h)(2).

2. Petitioner was the Chief Financial Officer, Senior Vice President, and Cashier of the First Guaranty Bank of Hammond, Louisiana (Bank). Pet. App. 2a. In 1990, the FDIC ordered the Bank to increase its capital, and the FDIC subsequently threatened to terminate the Bank's deposit insurance due to its dangerously low capital level. *Id.* at 3a-4a. Petitioner and two of his associates, also officers or senior managers of the Bank, devised a scheme to enhance the Bank's capital and acquire a controlling interest in it without investing any of their own funds. *Id.* at 2a-4a, 8a-50a. That scheme, which they called the "Pangaea Plan," involved the formation of a holding company that would acquire 80% of the Bank's outstanding stock and sell 30% of the holding company's stock to investors. *Id.* at 4a, 51a. Petitioner and his cohorts planned to keep 70% of the holding company's stock for themselves without paying for it. *Id.* at 4a, 51a-52a. To promote their scheme, petitioner and the others traveled internationally at the Bank's expense; they also caused the Bank to pay for

expensive service contracts and to make poorly underwritten loans to potential investors in their plan. *Id.* at 5a-6a, 51a-64a. Petitioner's activities provided little or no benefit to the Bank and caused the Bank to lose hundreds of thousands of dollars at a time when it could least afford it. *Id.* at 5a-6a, 25a-31a, 77a-79a.

3. On April 30, 1996, the FDIC issued a notice of its intent to remove petitioner from the Bank and prohibit him from further participation in the banking industry. Pet. App. 2a, 40a. One of the two OFIA ALJs was assigned to conduct an administrative hearing in the case. See *id.* at 2a-3a, 42a, 97a, 109a-110a, 207a-208a. The ALJ conducted a two-week evidentiary hearing and subsequently issued a decision recommending that petitioner be removed from the Bank and prohibited from further participation in the banking industry. See *id.* at 2a-3a, 42a, 109a-220a.

On May 25, 1999, the FDIC Board of Directors issued its Final Decision and Order, in which it found that grounds existed under 12 U.S.C. 1818(e) to remove petitioner from his position and prohibit him from further participation in the banking industry. Pet. App. 101a, 40a-108a. The Board made clear that it "ha[d] reviewed the record in its entirety" and "ha[d] adopted the ALJ's findings of fact and conclusions of law because they are supported by the preponderance of the evidence." *Id.* at 48a, 92a-93a.[1] Petitioner then requested review by the court of appeals.

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[1] In his submissions to the Board, petitioner contended, *inter alia*, that "the OTS's hiring of [the ALJ] and OFIA's assignment of him to this matter were unconstitutional" because "the OTS, the FDIC and OFIA are constitutionally disabled from appointing any employees who might be regarded as 'inferior officers.'" Pet. App. 96a. The Board rejected that contention, noting that "Congress has, in many instances and for many years, vested in non-Cabinet

4. The court of appeals denied the petition for review. Pet. App. 1a-39a. Petitioner contended, *inter alia*, that the Board's removal order was invalid because the ALJ who had heard the evidence and issued a recommended decision was an "inferior Officer" who had not been appointed in conformity with the Appointments Clause of the Constitution, Article II, Section 2, Clause 2. The court rejected that contention. Pet. App. 12a-16a. The court explained that the ALJ involved in petitioner's case was an employee rather than an inferior officer because the ALJ exercised "purely recommendatory powers" and had no authority to issue a final decision in any case. *Id.* at 16a; see also *id.* at 7a-8a ("The FDIC itself determined [petitioner's] responsibility after reviewing the ALJ's recommended decision de novo."); *id.* at 14a (explaining that "[f]inal decisions are issued only by the FDIC Board of Directors" and that "the FDIC Board makes its own factual findings").[2]

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agencies the authority to appoint inferior officers." *Ibid.* The Board explained that in FIRREA, "Congress directed the federal banking agencies to hire ALJs," and that the agencies have "agreed to share ALJs who, as an administrative matter, would be hired by OTS." *Ibid.* The Board concluded that

> pursuant to FIRREA, Congress, within its discretion, directed that the federal banking agencies establish a pool of ALJs to preside in administrative enforcement proceedings. To that end, the agencies established OFIA to oversee the work of the ALJ thus employed by OTS, and through which the banking agencies have the use of a "pool" of ALJs. Accordingly, the ALJ in this case was validly appointed within the meaning of the Appointments Clause.

Id. at 96a-97a.

[2] As we explain above (see note 1, *supra*), the FDIC Board concluded that even if the ALJ in this case was an inferior officer, his hiring by OTS and his assignment by OFIA were consistent

The court of appeals distinguished this Court's ruling in *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), which held that special trial judges (STJs) of the United States Tax Court are "inferior Officers" within the meaning of the Appointments Clause. The court of appeals explained that *Freytag* was not controlling because STJs (unlike the ALJ at issue here) are authorized to issue final decisions in certain categories of cases. See Pet. App. 14a-16a.

The court of appeals also rejected petitioner's contention that the FDIC had improperly refused to produce certain documents that he needed for his defense, and had improperly invoked the deliberative process and law enforcement privileges. Pet. App. 16a-23a. The court held as well that the Board's removal order was supported by substantial evidence. *Id.* at 24a-31a. It stated, in that regard, that petitioner's "use of Bank funds * * * in pursuit of breathtakingly irresponsible schemes" had exposed the Bank to "an undue and abnormal risk of insolvency." *Id.* at 26a.

Judge Randolph filed a separate opinion concurring in part and concurring in the judgment. Pet. App. 31a-39a. Judge Randolph concluded that "[t]here are no relevant differences between the ALJ in this case and the special trial judge in *Freytag*," *id.* at 33a, and that the ALJ was therefore properly regarded as an inferior officer, *id.* at 33a-37a. Judge Randolph stated, however, that "[g]iven the FDIC's *de novo* review and the majority's thorough rejection of [petitioner's] various claims of error," petitioner had "suffered no prejudice" as a result of the purported Appointments Clause violation. *Id.* at 38a. He therefore agreed with the ma-

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with the Appointments Clause. The FDIC did not press that argument in the court of appeals.

jority that the petition for review of the FDIC's final order should be denied. *Id.* at 39a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 9) that the panel decision will have a wide ranging effect on "a class of judges numbering more than 1,000." That assertion considerably overstates the significance of the court of appeals' decision. The court's decision directly addresses the constitutional status only of the ALJ (one of the two administrative law judges employed by OTS and assigned by OFIA) who presided at the administrative hearing in this case. The court of appeals did not purport to establish any categorical rule that administrative law judges are employees rather than "inferior Officers" for purposes of the Appointments Clause. To the contrary, the court's analysis focuses on the role of a particular ALJ, and his relationship to higher agency authority, within a specific decision-making structure.

2. The Appointments Clause of the Constitution states that the President

> shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. Art. II, § 2, Cl. 2. The "Officers of the United States" to which the Appointments Clause refers include "any appointee exercising significant authority pursuant to the laws of the United States." *Buckley* v. *Valeo*, 424 U.S. 1, 126 (1976). The term does not, however, encompass "employees of the United States," who are "lesser functionaries subordinate to officers of the United States." *Id.* at 126 n.162.

As the court of appeals correctly held, the ALJ who conducted the administrative hearing in this case is properly regarded as an employee rather than an "inferior Officer." Contrary to petitioner's contention (Pet. 11), the ALJ does not "perform adjudicatory functions otherwise those of agency heads." Any decision to remove and prohibit a bank officer must be made by the FDIC Board of Directors. 12 U.S.C. 1818(e)(4) and (h)(1). Pursuant to FDIC regulations, the ALJ is charged with producing only a "recommended decision, recommended findings of fact, recommended conclusions of law, and [a] proposed order." 12 C.F.R. 308.38(a). The FDIC Board of Directors renders a final decision and order after conducting a de novo review of the entire administrative record. 12 U.S.C. 1818(e)(4) and (h)(1); 12 C.F.R. 308.40(c).

Under no circumstances can the ALJ render the final decision of the FDIC. In the course of rendering its decision, moreover, the Board makes its own factual findings and does not accord deference to the findings of the ALJ. 12 U.S.C. 1818(h)(1); 12 C.F.R. 308.40(c); see also *In re Landry*, FDIC-95-65e, 1999 WL 639568, at *1 (FDIC July 8, 1999) (denying petitioner's request for a stay pending review in the court of appeals, and noting that the FDIC had given petitioner's case "an exhaustive de novo review"). Thus, the ALJ's role within the FDIC's decisionmaking scheme belies the

contention that the ALJ "exercis[es] significant authority pursuant to the laws of the United States." *Buckley*, 424 U.S. at 126.

Petitioner principally relies (Pet. 12-15) on *Freytag* v. *Commissioner*, 501 U.S. 868 (1991), in which this Court held that special trial judges (STJs) of the Tax Court are "inferior Officers" rather than employees for purposes of the Appointments Clause. The ALJ in this case, however, differs in important respects from the STJs at issue in *Freytag*. Most significantly, STJs are authorized to render final decisions in declaratory judgment proceedings and limited-amount tax cases pursuant to 26 U.S.C. 7443A(b)(1)-(3). See 501 U.S. at 873, 882. This Court held that the STJs' authority to render final decisions in those categories of cases required that they be treated as inferior officers for all purposes. See *id.* at 882 ("The fact that an inferior officer on occasion performs duties that may be performed by an employee not subject to the Appointments Clause does not transform his status under the Constitution."). Because the ALJ involved in the present matter is not empowered to issue a final decision in *any* type of case, that portion of the *Freytag* Court's analysis is altogether inapplicable here.

As the concurring judge in the court of appeals emphasized (see Pet. App. 35a-36a), one paragraph of the *Freytag* opinion suggests that STJs function as "inferior officers" even with respect to cases under 26 U.S.C. 7443A(b)(4), in which the STJ lacks authority to issue a final decision. The *Freytag* Court stated:

> The Commissioner reasons that special trial judges may be deemed employees in subsection (b)(4) cases because they lack authority to enter a final decision. But this argument ignores the significance of the

> duties and discretion that special trial judges possess. The office of special trial judge is "established by Law," Art. II, § 2, cl. 2, and the duties, salary, and means of appointment for that office are specified by statute. These characteristics distinguish special trial judges from special masters, who are hired by Article III courts on a temporary, episodic basis, whose positions are not established by law, and whose duties and functions are not delineated in a statute. Furthermore, special trial judges perform more than ministerial tasks. They take testimony, conduct trials, rule on the admissibility of evidence, and have the power to enforce compliance with discovery orders. In the course of carrying out these important functions, the special trial judges exercise significant discretion.

501 U.S. at 881-882 (citations omitted).

Even with respect to that aspect of the *Freytag* Court's analysis, however, the ALJ here differs significantly from a Tax Court STJ. The ALJ at issue in this case lacks "the power to enforce compliance with discovery orders" (501 U.S. at 882), since he is not vested with contempt powers. Rather, an aggrieved party must apply to a United States District Court for enforcement of a subpoena issued by the ALJ. See 12 C.F.R. 308.25(h), 308.26(c), 308.28(d), 308.34(c). Moreover, even in those cases that the STJ lacks final authority to decide, the STJ's factual findings are reviewed by the Tax Court under a deferential standard. See Pet. App. 14a; *Freytag*, 501 U.S. at 874 n.3. The FDIC, by contrast, accords no deference to the ALJ's findings of fact. See Pet. App. 14a; pp. 8-9, *supra*.[3]

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[3] Petitioner's attempt (see Pet. 10-11) to analogize the ALJ to a federal district court or magistrate judge is similarly misconceived.

Petitioner also relies (Pet. 15, 16) on *Weiss* v. *United States*, 510 U.S. 163 (1994), and *Edmond* v. *United States*, 520 U.S. 651 (1997), which held that military trial and appellate judges are inferior officers. Petitioner's reliance on those decisions is misplaced. The military trial judges at issue in *Weiss* "rule[] on all legal questions, and instruct[] court-martial members regarding the law and procedures to be followed." 510 U.S. at 167. The trial judge may also render the final decision in a case with the consent of the accused. See Art. 16(1)(B) and (2)(C) of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 816(1)(B) and (2)(C); Art. 51(d), UCMJ, 10 U.S.C. 851(d); *Weiss*, 510 U.S. at 168. And while the court-martial's findings and sentence are subject to review in any case in which the accused is convicted (see Pet. 15), "the United States may not appeal an order or ruling that is, or that amounts to, a finding of not guilty with respect to the charge or specification." Art. 62(a)(1), UCMJ, 10 U.S.C. 862(a)(1) (1994 & Supp. IV 1998). The court-martial's decision is therefore final and unreviewable in a significant category of cases.

Edmond is also distinguishable. The military appellate judges at issue in *Edmond* render final decisions in cases in which the Judge Advocate General declines to invoke the jurisdiction of the Court of Appeals for the Armed Forces (CAAF) and the CAAF denies the defendant's request for discretionary review. See Art. 66(a), UCMJ, 10 U.S.C. 866(a); *Edmond*, 520 U.S. at 664-665. And even where the CAAF does exercise jurisdiction, it reviews the factual findings of the inter-

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District judges routinely decide contested cases, and magistrate judges are authorized, with the consent of the parties, to make final dispositions of a variety of matters. See 28 U.S.C. 636.

mediate court under a deferential standard. See *id.* at 665.[4]

3. In conducting judicial review under the Administrative Procedure Act, a court "shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error." 5 U.S.C. 706. Courts are generally reluctant to set aside agency action unless "the party asserting error [can] demonstrate prejudice from the error." *DSE, Inc.* v. *United States*, 169 F.3d 21, 31 (D.C. Cir. 1999) (quoting *Air Canada* v. *Department of Transp.*, 148 F.3d 1142, 1152 (D.C. Cir. 1998)). Petitioner does not contest the court of appeals' determination that the FDIC's decision in this case was supported by substantial evidence. Indeed, as the court of appeals observed, the FDIC Board's most compelling evidence came from petitioner himself. See Pet. App. 6a, 28a, 38a n.4.

Even assuming *arguendo* that the ALJ was not appointed in conformity with the Appointments Clause,

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[4] In concluding that judges on the Coast Guard Court of Criminal Appeals are "inferior" rather than "principal" officers, the Court in *Edmond* observed that those judges "have no power to render a final decision on behalf of the United States *unless permitted to do so by other Executive officers*." 520 U.S. at 665 (emphasis added). The underscored language reflects the fact that the CAAF must review any case that the Judge Advocate General directs it to hear, and may review any other case "upon petition of the accused." See *ibid.* (quoting Art. 67(a), UCMJ, 10 U.S.C. 867(a)). But while decisions of the Court of Criminal Appeals are subject to further review at the discretion of Executive Branch officials, that court nevertheless renders the ultimate decision in numerous cases where the Judge Advocate General does not invoke the CAAF's jurisdiction and the CAAF denies the defendant's petition for review. Petitioner's description of the case omits the underscored language. See Pet. 16.

such a deficiency would not provide a basis for invalidating the order that is before this Court. The decision under review is a decision of the FDIC Board, not a decision of the ALJ. See 12 U.S.C. 1818(e), (h)(1) and (h)(2). As explained above, the ALJ simply presented the Board with recommendations. The decision from which petitioner seeks relief was issued by the Board itself, which engaged in de novo review of petitioner's legal and factual claims; the ALJ's recommendation had no more than persuasive force and did not constrain the Board's discretion in any way. Because the ALJ's recommendation is neither the cause of petitioner's legal disabilities nor the subject of the current review proceeding, any defect in the ALJ's selection would not provide a basis for setting aside the order of the Board.

In *Ryder* v. *United States*, 515 U.S. 177, 186-188 (1995), this Court held that a constitutional infirmity in the method of selection of judges on the Coast Guard Court of Military Review (now called the Court of Criminal Appeals) was not rendered harmless by the availability of further review in the Court of Military Appeals (now called the CAAF). Petitioner relies (Pet. 16) on *Ryder* as support for the proposition that "the FDIC Board's *de novo* review does not cure the constitutional violation in the instant case." In *Ryder*, however, the Court emphasized that while the Courts of Military Review "exercise *de novo* review over the factual findings and legal conclusions of the court-martial," the Court of Military Appeals applies a narrower standard of review and will affirm a judgment of conviction "so long as there is some competent evidence in the record to establish the elements of an offense beyond a reasonable doubt." *Ryder*, 515 U.S. at 187. The Court concluded:

> Examining the difference in function and authority between the Coast Guard Court of Military Review and the Court of Military Appeals, it is quite clear that the former had broader discretion to review claims of error, revise factual determinations, and revise sentences than did the latter. It simply cannot be said, therefore, that review by the properly constituted Court of Military Appeals gave [the defendant] all the possibility for relief that review by a properly constituted Coast Guard Court of Military Review would have given him.

Id. at 187-188. Here, by contrast, the FDIC issues its own decision and accords no deference to the findings of the ALJ. There is consequently no basis for concluding that any defect in the manner of the ALJ's selection prejudiced petitioner or deprived him of any substantive protection guaranteed by law.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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